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Jan 26 1988		Brief of respondent Ohio in opposition filed.
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Feb 22 1988		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)

87-6127

(2)

In The

Supreme Court of The United States

No. _____

October Term, 1987

RONALD RAY POST,

PETITIONER,

-vs-

STATE OF OHIO,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

I. Whether this Court's decision in Booth v. Maryland that it is prejudicial error to admit victim impact evidence in the sentencing stage of a death penalty trial is equally applicable to a case tried before a three judge panel as one tried by a jury?

II. Whether Petitioner's Fifth and Sixth Amendment constitutional rights were violated by holding admissible his self-incriminating statements made to a defense retained polygraphist?

III. Whether a death sentence based on a plea of no contest which was not knowingly intelligently and voluntarily made is constitutionally valid?

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Petitioner, Ronald Ray Post, prays that a Writ of Certiorari issue to review the judgment and opinion of The Supreme Court of Ohio entered in the above-entitled proceeding on September 16, 1987. A Motion for Rehearing was denied by the court below on October 28, 1987.

OPINIONS BELOW

The opinion of The Supreme Court of Ohio is reported as State v. Post, 32 Ohio St. 3d 380 (1987) and is reprinted in the appendix hereto, p. A-4 - A-11. The opinion on the Court of Appeals of Ohio, Ninth District, is unreported and is reprinted in the appendix hereto, p. A-12 - A-36. The opinion of the trial court was entered on March 20, 1985 and is unreported. It is reprinted in the appendix hereto, p. A-37 - A-41.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. Section 1257(3).

The judgment of the Court of Appeals was entered on January 15, 1986. The Supreme Court of Ohio affirmed Petitioner's conviction and death sentence on September 16, 1987. On October 28, 1987 Petitioner's motion for rehearing was denied by the Ohio Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves four Amendments to the United States Constitution:

A) The Fifth Amendment, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B) The Sixth Amendment, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in favor, and to have the Assistance of Counsel for his defense.

C) The Eighth Amendment, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

D) The Fourteenth Amendment, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In addition, this case also involves sections of the Ohio Revised Code which are reprinted in the appendix.

STATEMENT OF THE CASE

On April 17, 1984, Petitioner was indicted on one count of aggravated robbery with a firearm specification (count one); one count of aggravated murder under R.C. 2903.01(A), with a specification that the offense was committed while Post was committing or attempting to commit aggravated robbery, and that Post was the principal offender or committed the murder with prior calculation and design, and with a firearm specification (count two); and one count of aggravated murder under R.C. 2903.01(B), with the same specifications as enumerated in count two above (count three).

The court appointed two attorneys to represent the Petitioner. Defense counsel retained a polygraph expert to assist in the preparation of Petitioner's case. During the course of the polygraphist interview with Petitioner, Petitioner gave an incriminatory statement. Shortly after this interview, Petitioner solicited legal advice from his cellmate, Richard Slusher. Petitioner related to Slusher the fact that he had previously made certain incriminating statements to the defense polygraphist.

Prior to trial, inmate Slusher relayed to the Prosecuting Attorney that Petitioner had made certain admissions to the defense polygraphist. Based upon such information the Prosecutor issued a trial subpoena to the defense polygraphist. The prosecutor succeeded, despite defense counsel's efforts, in having the trial court rule that the statement to the polygraphist would be admissible in evidence during Petitioner's trial.

Based upon this ruling by the court, the Petitioner, under advice of counsel, entered a no contest plea to all charges specified in the indictment. No charges or specifications were dismissed in exchange for the plea. No stipulation was made to insure the existence of a mitigating factor. The plea of no contest failed to be, of itself, a mitigating factor. Appellant's plea of no contest did not in any way increase his chances of receiving a life sentence.

Following Petitioner's tender of the no contest plea, no evidence was submitted to the three-judge panel establishing either the viability of the state's case or the evidentiary basis for the plea. All that was presented was the prosecutor's perfunctory "Statement of Facts." This statement was a purely conclusory argument devoid of any proffer as to available testimony or documentary evidence. In fact, the prosecutor made the point that his "Statement of Facts" specifically did not rely on the testimony of the polygraph examiner or upon anyone's testimony, in or out of the record, which could arguably establish the state's case. Defense counsel entered an objection to the statement of facts. The court accepted this "Statement of Facts" and pronounced appellant guilty on all counts charged in the indictment.

Throughout this time Ronald Post maintained his innocence.

Petitioner was referred to the Probation Department for a presentence report which was admitted during the sentencing phase of Petitioner's trial. The presentence report included a victim impact summary based on interviews with the victim's family. Additionally, the son of the victim was allowed to make a statement at the sentencing hearing in which he detailed the effect his mother's death had on him and his family and asked that the death penalty be imposed.

Petitioner was sentenced to death.

Petitioner's conviction and death sentence were affirmed to the Court of Appeals and the Supreme Court of Ohio.

PRESERVATION OF FEDERAL QUESTION

The questions that the Petitioner brings before this Court were raised in the courts below.

When this Court took certiorari on the question of the admissibility of victim impact evidence in Booth v. Maryland, 96 L. Ed. 2d 440 (1987), the Petitioner's case was pending in the Ohio Supreme Court, oral argument had not yet been scheduled. The Petitioner filed a supplemental brief with the Ohio Supreme Court on this issue and the Ohio Supreme Court accepted the additional

proposition of law and reached the merits of the issue in the opinion. State v. Post, 32 Ohio St. 3d 380, 382-384 (1987). See Appendix, A-4.

The Sixth and Fifth Amendment issues dealing with testimony of defense retained polygraph expert were objected to by trial counsel and raised as error in both the Court of Appeals (State v. Post, Lorain App. No. 3868 (Jan. 15, 1986), unreported, Appendix p. A-12) and the Ohio Supreme Court (State v. Post, 32 Ohio St. 3d 380, 384-386 (1987), Appendix p. A-4).

The issue dealing with the no contest plea was raised in the court below and addressed by that court. See Appendix p. A-7.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

IT IS A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND CONTRARY TO THIS COURT'S DECISION IN BOOTH V. MARYLAND TO ALLOW THE INTRODUCTION OF VICTIM IMPACT EVIDENCE DURING THE SENTENCING PHASE OF A CAPITAL CASE TRIED BEFORE A THREE JUDGE PANEL.

In Booth v. Maryland, 482 U.S. ___, 96 L. Ed. 2d 440 (1987), reh'g denied, 108 S. Ct. 31 (1987), this Court held that the introduction of a victim impact statement at the sentencing phase of a capital murder trial violates the Eighth Amendment of the United States Constitution. In Petitioner's case, not only was a victim impact statement presented to the Court, but the victim's son was allowed to make an in-court statement. The statement concerned both the effect the death of his mother had on him and his family, and a recommendation that the death penalty be imposed. (See Appendix p. A-43 for copies of the statements.) The trial court in its opinion noted that this particular statement was part of the evidence presented to it with regard to sentencing. (See Opinion of the trial court, A-43.)

The Ohio Supreme Court, contrary to this Court's decision in Booth, held that even though Ohio's statutory scheme prohibited the use of victim impact evidence in a capital case, there was no reversible error in Petitioner's trial because it was considered by a three judge panel. State v. Post, 32 Ohio St. 3d 380, 384. However, this distinction is irrelevant to the analysis used by this Court in Booth.

The Maryland Statute invalidated by this Court provided that

> In any case in which the death penalty is requested ... a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted... (Emphasis added.)

Md. Ann. Code, Art. 41, Section 4-609(d) (1986).

This Court did not limit its holding to jury cases, but rather invalidated the entire statute. Hence, any assertion that Booth is limited to capital jury trials is specious.

The State of Maryland in Booth relied upon the case of Lodoski v. State, 302 Md. 691 (1985), vacated on other grounds, 475 U.S. ___ (1985). Lodoski was a capital case that was tried to a jury, but the sentencing hearing was before a judge. This Court, in rejecting the State's argument in Booth, also rejected the conclusion in Lodoski that a judge, acting as a trier of fact in a capital case, could consider a victim impact statement.

The court below claims that Booth requires more than mere consideration of the victim impact statement by the trier of fact. The Court states that there must be a showing that the trier of fact was influenced by the victim impact statement. The Booth opinion does not support such an assertion. Booth held that any evidence of emotional distress of the victim's family creates an impermissible risk that the capital decision would be made in an arbitrary manner. Booth, 96 L. Ed. 2d at 450. The Booth decision did not create a standard which must be met in order to prove error when victim impact evidence is introduced but held instead that any introduction is unconstitutional. Therefore any time either a jury or judge reviews such a statement in a capital case, an impermissible risk is created.

It is a long-standing principle that a State cannot afford less constitutional protection to a defendant than the federal constitution provides. This Court has determined that the Eighth Amendment prohibits the introduction of victim impact evidence into the sentencing proceeding of a capital case. Therefore, the State of Ohio cannot allow the admission of this evidence when it is prohibited by the Constitution. Additionally, the use of a victim impact statement in a capital case is not subject to the harmless

error analysis of Chapman v. California, 386 U.S. 18 (1967). This Court did not even mention the possibility of harmless error in Booth because it is the mere introduction of the statement that creates a constitutionally unacceptable risk that the death penalty may be imposed in an arbitrary and capricious manner. This type of error can never be harmless in a capital case.

Petitioner asks that the Court grant certiorari in this case to reassert that a victim impact evidence cannot be introduced in a capital case whether the sentencer is judge or jury.

II.

BY RULING ADMISSIBLE PETITIONER'S SELF-INCRIMINATING STATEMENTS MADE TO A DEFENSE RETAINED POLYGRAPHIST, THE TRIAL COURT VIOLATED PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS.

The trial court in the present case ruled that statements and admissions made by the Petitioner to a defense agent during the course of the agent's employment were admissible at trial against the Petitioner.

This issue involves two constitutional issues; does the Sixth Amendment right to counsel preclude a defense expert from being compelled to testify against Petitioner and does that compulsion interfere with Petitioner's Fifth Amendment privilege against self-incrimination.

SIXTH AMENDMENT ANALYSIS

Every defendant threatened with a loss of liberty in a criminal proceeding has a constitutional right to assistance of counsel. Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972); Kirby v. Illinois, 406 U.S. 682 (1972); United States v. Wade, 388 U.S. 218 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932). In Powell, supra, it was recognized that criminal defendants need the "guiding hand of counsel" to assist them in preparing and presenting their defenses.

In the present case the combined actions of the Prosecutor's issuance of a subpoena for Petitioner's defense polygraphist and the trial court's ruling

that the testimony of the defense polygraphist would be admissible effectively eliminated or deprived Petitioner of this constitutional right to the assistance of counsel. In Weatherford v. Bursey, 429 U.S. 545, 544 n. 4 (1977) this Court noted:

> [T]he Sixth Amendment's assistance of counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding. Brief for United States in Hoffa v. United States, OT 1966, No. 32, p. 21, quoted Brief for United States as Amicus Curiae in the instant case, p. 24 n. 13.

The record at the pretrial hearing in the present case is clear. No one was present when Petitioner made his statement to the polygraphist who was employed by defense counsel. Secondly, the polygraphist was acting as an agent of defense counsel. Finally, the polygraphist viewed the communication as protected from disclosure.

The federal courts as well as an other State court have held contrary to the Ohio Supreme Court on this issue. See United States, ex rel. Shiflet v. Lane, 625 F. Supp. 677 (N.D. Ill. 1985), reversed on other grounds, 815 F. 2d 457 (7th Cir. 1987); Bishop v. Rose, 701 F. 2d 1150 (C.A.6, 1983); People v. Knippenberg, 66 Ill. 2d 276, 362 N.E. 2d 681 (Ill. 1977).

The holdings in Shiflet, Bishop, and Knippenberg make it abundantly clear that the incriminating statements given to the defense polygraph expert in the case were entitled to protection under the right to counsel provisions in the Sixth Amendment. The only difference between these cases and the one sub judice is the communication between Petitioner and the jailhouse informant, Richard Slusher. The Ohio courts found this communication to constitute waiver of right of counsel, but there is no support for this conclusion.

Disclosing to a jailhouse informant the existence of incriminating statements given in a privileged communication does not constitute a waiver of the Sixth Amendment right to counsel. To establish waiver of the right to counsel it is incumbent upon the state to prove an intentional relinquishment of a known right or privilege. Brewer v. Williams, 430 U.S. 387 (1984),

rehearing denied, 431 U.S. 925 (1977). In addition, the courts must indulge in every reasonable presumption against waiver. Williams at 404. The determination of the issue whether Petitioner knowingly and intelligently waived his Sixth Amendment constitutional right must necessarily depend in each case upon peculiar facts and circumstances surrounding that case, including the background, experience and conduct of the accused. Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983); North Carolina v. Butler, 441 U.S. 369, 374-75 (1979).

There is nothing in the record of this case to support the allegation that Petitioner knowingly and intelligently waived his right to effective assistance of counsel. The state was not a party to the original communication to the polygraph examiner. Petitioner was never informed that the mere mention of the existence of incriminating statements to the inmate would constitute a waiver of his right to counsel with respect to the admissibility of such statements.

More importantly, Petitioner's conduct strongly suggests a specific intent to avoid every possibility that the state would use information given to the defense expert. When Petitioner discussed the interview with the polygraph examiner, he did not direct his conversation to one believed to be an agent of the state. Rather, Petitioner went to inmate Slusher seeking advice on his upcoming trial. This conduct militates against any inference that Petitioner intended to waive his right to counsel.

FIFTH AMENDMENT ANALYSIS

The admission into evidence of communication between Petitioner Post and Robert Holmok, a defense retained polygraph expert, violated Petitioner's Fifth Amendment privilege against self-incrimination.

The Fifth Amendment protects individuals from government attempts to compel production of testimonial or communicative evidence that is self-incriminating. Malloy v. Hogan, 378 U.S. 1 (1964), (applying the Fifth Amendment to the states through the Fourteenth Amendment). In addition to

protecting a defendant from the compelled production of oral testimony, the Fifth Amendment protects the defendant from the compelled production of documents which are testimonial in nature. United States v. Doe, 465 U.S. 605 (1984); Bellis v. United States, 417 U.S. 85 (1974); Boyd v. United States, 116 U.S. 616 (1886).

In United States v. Fisher, 425 U.S. 391 (1976), this Court stated:

> "It follows, then, that when the client himself would be privileged from production of the document, either as a party at common law ... or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce."

Numerous state courts have held that statements made to polygraph experts have the same protections that statements made to attorneys have. People v. Mercy, 91 Mich. App. 399, 283 N.W. 2d 754 (1979); People v. George, 104 Misc. 2d 630, 428 N.Y.S. 2d 825 (1980); Brown v. State (Ind. 1983), 448 N.E. 2d 10. See, also, Annotation, 14 A.L.R. 4th 594 (1982). Therefore, any privilege against self-incrimination available to the Petitioner is also available to his attorney and those experts retained by the defense attorney for purposes of trial preparation, namely the defense retained polygraph expert.

In cases interpreting Fisher the courts have emphasized this Court's statement that "the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating." Fisher, 425 U.S. at 408. These subsequent case have broken this statement, for application purposes, into three parts: 1) compulsion of a; 2) testimonial communication that is; 3) incriminating. See United States v. Authement, 607 F. 2d 1129, 1231 (C.A.5, 1979), Matter of Grand Jury Empanelled, 597 F. 2d 851 (C.A.3, 1979). All three conditions must be satisfied in order to show a Fifth Amendment violation.

Applying these requisites to the case sub judice, it is clear that the Fifth Amendment has been violated. First, the production of the incriminating statement was compelled. The record reveals that the State served a subpoena upon Robert Holmok, the defense polygraph expert retained by the Petitioner,

in order to compel him to testify against the Petitioner, and Mr. Holmok produced the evidence only after the judge ordered him to do so. These efforts, if directed at Petitioner himself, rather than Holmok, would constitute sufficient "compulsion" to engage the privilege against self-incrimination. SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735 (1984); Harris v. New York, 401 U.S. 222, 225 (1971); cf. United States v. Zirpolo, 704 F. 2d. 23, 25-26 (C.A.1, 1983), certiorari denied, 104 S. Ct. 87 (1983) (witness not yet sentenced may invoke Fifth Amendment privilege against testifying in trial of former co-defendant where government has not agreed to dismiss other counts.) A defendant is no less compelled because it is his attorney who is called upon to testify or otherwise disclose communicative evidence. United States v. Fisher, supra.

Second, the evidence consisted of a "testimonial communication." The record reveals that the polygraph examination contained a statement given by the Petitioner and transcribed by Robert Holmok consisting of an admission to the offense with which he was charged. In Fisher the Court discussed the term "testimonial" and found that accountant's workpaper's are not testimonial. The Court based this finding on the fact that the workpapers were not prepared by the defendant and did not contain any testimonial declarations by him. Here neither of those aspects is present. Although transcribed by the polygraph expert, the statement exists because of what the Petitioner told Mr. Holmok. Also, the statement contained a testimonial given by Petitioner Post.

The statement contained in the polygraph exam is clearly different from other evidence disclosed not to be testimonial. In Fisher the Court stated:

> We have, accordingly, declined to extend the protection of the privilege to the giving of blood samples, Schmerber v. California, 384 U.S. 757, 763-764, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966), to the giving of handwriting exemplars, Gilbert v. California, 388 U.S. 263, 265-267, 18 L. Ed. 2d 1178, 87 S. Ct. 1951 (1967); voice exemplars, United States v. Wade, 388 U.S. 218, 222-223, 18 L. Ed. 2d 1149, 87 S. Ct. 1926 (1967); or the donning of a blouse worn by the perpetrator, Holt v. United States, 218 U.S. 245, 54 L. Ed. 1021, 31 S. Ct. 2 (1910).

Fisher, 425 U.S. at 408.

Clearly, the statement presented into evidence at Petitioner's trial is testimonial communication.

The third requirement for a violation of the Fifth Amendment proscription of self-incrimination, that the evidence be incriminating, is also present. Little discussion is necessary to show that an admission of guilt, entered into evidence, is incriminating.

Therefore, it is clear that Petitioner Fifth Amendment protection against self-incrimination was destroyed by the State's introduction into evidence of the polygraph exam and testimony by Robert Holmok.

An effective waiver of a fundamental constitutional guarantee can only be accomplished through "knowing and intelligent acts done with sufficient awareness of relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970). Specifically to Fifth Amendment issues, disclosures made outside of the courtroom or before trial do not operate as a waiver of privilege which arise in the course of the trial itself. Even where a waiver is found to have occurred with respect to pre-trial disclosures, such waiver is very limited in its effect. For instance, a defendant's testimony at a pre-trial hearing, offered to secure the constitutional right against unlawful seizures, cannot subsequently be introduced by the government in its case-in-chief. United States v. Kahan, 415 U.S. 237 (1974); Simmons v. United States, 390 U.S. 377 (1968).

It is obvious from the Kahan decision that the disclosure of the substance of material protected by the Fifth Amendment does not operate as an absolute waiver of the privilege. The waiver only applies to any Fifth Amendment protection surrounding the communication directly connected to the waiver, not any antecedent or subsequent communication. Any privilege against self-incrimination which has attached to collateral communications or testimony remains in effect. United States v. Kahan, supra.

In the case sub judice, the incriminating statements, given by Petitioner to the defense expert Robert Holmok are protected by the constitutional privilege against self-incrimination. United States v. Fisher, supra. If the disclosure of the existence of these statements to jailhouse informant Richard

Slusher operates as a waiver, it does so only so far as the statement to Slusher itself. United States v. Kahan, supra. Therefore, Slusher may be allowed to testify as to these incriminating statements made to him, but this disclosure does not permit the state to demand production of incriminating evidence in the hands of the defense attorney or the attorney's agents.

The facts of this case, as analyzed through related case law, make it clear that Petitioner's statement to Robert Holmok was privileged communication, and the use of this statement against him deprived him of his Fifth Amendment privilege against self-incrimination.

CONCLUSION

Ronald Post made a statement to a jailhouse informant concerning previous privileged communications with an expert employed by Post's attorneys. Petitioner does not contest that such statements to the jailhouse informant were admissible. However it is abundantly clear that Petitioner's statement to the jailhouse informant did not serve as an implied waiver as to the protections guaranteed Petitioner by the Fifth and Sixth Amendments to the United States Constitution.

Jailhouse "snitches" have developed notoriety throughout the entire history of the American Justice System. Many a criminal case has been determined by the degree of credibility afforded such individuals by juries. However the present case attempts to extend new power to such testimony. The State of Ohio now attempts to determine the waiver of valuable Fifth and Sixth Amendment rights based upon such suspect testimony. Such testimony can never meet the high standards of waivers previously established as to these rights.

Petitioner requests that this Court grant Certiorari in this case in order to determine if the compelled testimony of a defense retained polygraphist violates the Fifth and Sixth Amendments.

III.

PETITIONER'S PLEA OF NO CONTEST WAS NOT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY MADE AND WAS THEREFORE INVALID UNDER THIS COURT'S RULING IN BRADY V. UNITED STATES.

On November 30, 1984, in the Court of Common Pleas of Lorain County, Ohio, Petitioner Ronald Ray Post, on advice of counsel, changed his plea of

not guilty to no contest as to the charges alleged in the indictment against him.

After discussing the matter with him but without determining there to be a factual basis for the plea, the three-judge panel accepted the Petitioner's plea of no contest. Following the sentencing phase, the court sentenced Petitioner to death.

In Brady v. United States, 397 U.S. 742, 748 (1970), this Court held that in order for a court to accept a plea of guilty or no contest, the Fifth, Sixth and Fourteenth Amendments require that these pleas "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." For reasons stated below, Petitioner's plea of no contest was not voluntarily, knowingly, and intelligently made.

Before entering into a discussion of the issues involved it is important to note that this Court has held that a plea of no contest is no different for constitutional purposes from a guilty plea. North Carolina v. Alford, 400 U.S. 25, 36 (1970). Therefore any cases dealing with constitutional issues surrounding guilty pleas can also be used to analyze the case sub judice.

Petitioner's plea of no contest was not voluntarily made and should not have been accepted by the trial court. There is no indication in the record that Petitioner got anything in return for his plea of no contest. There is no logic to support the statement that a defendant would give up his right to contest the charge against him, although still maintaining his innocence, in return for an almost certain death sentence, which Petitioner did in fact receive. On all the occasions this Court has found voluntary a defendant's guilty or no contest plea it has been accompanied by recognition of the fact that the defendant received a reduced sentence in return for his plea. See United States v. Jackson, 390 U.S. 570 (1968); Brady v. United States, 397 U.S. 742 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); North Carolina v. Alford, 400 U.S. 25 (1970). The reduced sentence supports the notion of voluntariness.

> Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.

Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

Additional support is found for the contention that Petitioner's no contest plea was involuntary in the fact that the strongest evidence which could have been admitted against him was obtained in violation of his Fifth and Sixth Amendment privilege against self-incrimination and right to assistance of counsel. (See discussion supra.) Petitioner's plea was accepted without any plea bargaining or any other evidence of voluntariness.

Petitioner's plea of no contest was also not intelligently made. In North Carolina v. Alford, 400 U.S. 25 (1970), a case involving entry of a guilty plea in spite of maintained innocence as to his involvement, this Court found the defendant's guilty plea to have been intelligently made. However, in that case this Court based its determination on facts not present in the case sub judice. In Alford the Court noted:

> When his plea is viewed in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered. (Citations omitted.) Its validity cannot be seriously questioned.

Alford at 37-38. (Emphasis added.) In the present case there is no evidence to negate Petitioner's claim of innocence because, as the Ohio Supreme Court noted in its decision, the trial court made no effort to establish a factual basis for the plea. State of Ohio v. Post, 32 Ohio St. 3d 380, 387 (1987). Although Ohio's Criminal Rule 11 does not require an inquiry into the evidence supporting a no contest plea, when a defendant enters such a plea but maintains his innocence, a determination as to the intelligent making of the plea requires that the court find factual support before accepting it.

Petitioner's plea was not intelligently made because it did not involve effective assistance of counsel. Without entering into a lengthy discussion of ineffective assistance it must be noted, as this Court has stated:

> Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation.

Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978), (citing Brady v. United States, 397 U.S. 742, 758 (1970).

Petitioner's counsel was ineffective in advising him to enter a plea of no contest without obtaining any reduction in sentence in return for such plea. In McMann v. Richardson, 397 U.S. 759 (1970), this Court held that the Respondent was not entitled to have his guilty plea voided because of an unintelligent plea where it was based on "reasonably competent advice." Id. at 770. Petitioner's advice from counsel to enter a plea of no contest without getting a reduction in sentence cannot be considered reasonably competent. The outcome of Petitioner's case is evidence of just how incompetent the advice was. Because the advice given by Petitioner's counsel was not reasonably competent his plea of no contest was not intelligently made and should not have been been accepted.

Petitioner asks that this Court accept certiorari in this case to determine is a death sentence case be imposed on a defendant when the no contest plea that led to his conviction was not voluntarily, knowingly and intelligently made.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

PROPOSITIONS OF LAW RAISED IN THE OHIO SUPREME COURT

PROPOSITION OF LAW NO. 1

THE STATE'S EXPLOITATION OF CONFIDENTIAL RELATIONSHIPS AND USE OF CONFIDENTIAL INFORMATION VIOLATED DEFENDANT'S PRIVILEGE AGAINST SELF-INCRIMINATION, RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, RIGHT OF MEANINGFUL ACCESS TO THE COURTS AND DUE PROCESS RIGHTS, UNDER SECTIONS 10 AND 16, ARTICLE I, OHIO CONSTITUTION, AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. 2

APPELLANT'S PLEA OF NO CONTEST DID NOT REPRESENT A VOLUNTARY AND INTELLIGENT CHOICE AMONG THE ALTERNATIVE COURSES OF ACTION OPEN TO DEFENDANT, THEREFORE, THE PLEA IS INVALID AND ACCEPTANCE OF SUCH PLEA CONSTITUTES PLAIN ERROR UNDER SECTIONS 10 AND 16, ARTICLE I, OHIO CONSTITUTION, AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. 3

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHICH WORKED TO HIS ACTUAL AND SUBSTANTIAL DISADVANTAGE WHEN THE LAWYER REPRESENTING HIM ACTED OUTSIDE THE RANGE OF PROFESSIONALLY COMPETENT ASSISTANCE IN VIOLATION OF SECTION 10, ARTICLE I, OHIO CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. 4

THE SENTENCING PANEL'S FAILURE TO CONSIDER ALL THE EVIDENCE PRESENTED IN MITIGATION WAS A VIOLATION OF APPELLANT'S RIGHTS UNDER R.C. 2929.04(B) AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. 5

APPELLANT'S RIGHTS TO DUE PROCESS, EQUAL PROTECTION, AND TO BE FREE FROM THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT WERE VIOLATED BY THE ARBITRARY OR CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN THIS CASE; EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. 6

THE TRIAL COURT ERRED IN NOT COMPLYING WITH R.C. 2929.03(F) WHICH MANDATES THAT THE COURT STATE IN ITS OPINION THE COURT'S FINDINGS AS TO THE EXISTENCE OF ANY OF THE MITIGATING FACTORS DENOMINATED IN R.C. 2929.04(B) AND ITS REASONS WHY THE MITIGATING FACTORS ARE OUTWEIGHED BY THE AGGRAVATING CIRCUMSTANCES VIOLATING APPELLANT'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION TO THE UNITED STATES.

PROPOSITION OF LAW NO. 7

UNDER R.C. 2929.05 THE COURT MUST INDEPENDENTLY WEIGH THE EVIDENCE AND MUST REVERSE THE SENTENCE OF DEATH WHERE THE MITIGATING FACTORS ARE NOT OUTWEIGHED BY THE AGGRAVATING CIRCUMSTANCE.

PROPOSITION OF LAW NO. 8

THE PROPORTIONALITY REVIEW THAT THIS COURT MUST CONDUCT IN THE PRESENT CAPITAL CASE PURSUANT TO R.C. 2929.05 VIOLATES SECTIONS 5 AND 10, ARTICLE I, OF THE OHIO CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. 9

THE TRIAL COURT ERRED BY FAILING TO SCRUPULOUSLY FOLLOW THE PROCEDURE PROSCRIBED IN CRIM. R. 11(C)(3) REQUIRING A TRIAL DE NOVO AS TO THE EXISTENCE OF SPECIFIED AGGRAVATING FACTOR, THEREBY VIOLATING APPELLANT'S RIGHT TO DUE PROCESS AND MEANINGFUL APPELLATE REVIEW.

PROPOSITION OF LAW NO. 10

OHIO'S MANDATORY SENTENCING SCHEME PREVENTED THE SENTENCING PANEL FROM DECIDING WHETHER DEATH WAS THE APPROPRIATE PUNISHMENT IN VIOLATION OF APPELLANT'S RIGHTS AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 9 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. 11

OHIO'S STATUTORY PROVISIONS GOVERNING THE IMPOSITION OF THE DEATH PENALTY ARE UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTIONS 2, 9, 10 AND 16, ARTICLE I, OF THE OHIO CONSTITUTION.

PROPOSITION OF LAW NO. XII

IT IS A VIOLATION OF R.C. 2943.041 AND PREJUDICIAL ERROR FOR A TRIAL COURT TO CONSIDER AN INFLAMMATORY VICTIM IMPACT STATEMENT IN ITS SENTENCING DECISION.

ASSIGNMENTS OF ERROR IN THE COURT OF APPEALS

FIRST ASSIGNMENT OF ERROR . . . . . .

The trial court erred by not suppressing a confidential communication between the appellant and a defense retained expert.

SECOND ASSIGNMENT OF ERROR. . . . . .

The trial court erred in not complying with Ohio Revised Code Section 2929.03(F) which mandates that the panel of three judges state the reasons why the aggravating circumstances outweighed the mitigating factors when the sentence of death is imposed.

THIRD ASSIGNMENT OF ERROR . . . . . .

The trial court erred in not complying with Ohio Revised Code Section 2929.03(F) which mandates that the court state in its opinion the court's findings as to the existence of any of the mitigating factors denominated in Ohio Revised Code Section 2929.04(B)

FOURTH ASSIGNMENT OF ERROR. . . . . .

The trial court erred by not requiring the prosecution to prove beyond a reasonable doubt that the aggravated circumstance the defendant was found guilty of committing was sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

FIFTH ASSIGNMENT OF ERROR . . . . . .

The court erred to the prejudice of the Appellant by failing to consider as mitigating factors the Appellant's age, his lack of prior felony convictions, his relationship with his wife, children, mother and stepmother and his plea of no contest.

SIXTH ASSIGNMENT OF ERROR . . . . . .

The panel of three judges erred in imposing the death sentence, which under the facts of the case, is inappropriate, excessive and disproportionate to the penalty imposed in similar cases.

SEVENTH ASSIGNMENT OF ERROR . . . . . .

The trial court erred in finding that the aggravating circumstance outweighed beyond a reasonable doubt the mitigating factors adduced at the sentencing hearing.

court of appeals unanimously approved the sentence of death as appropriate.

The cause is before this court upon an appeal as of right.

Gregory A. White, prosecuting attorney, and *Mark E. Stephenson*, for appellee.

Randall M. Dana, public defender, *David C. Stebbins*, *G. Benjamin Wills* and *Randall Porter*, for appellant.

HERBERT R. BROWN, J. In accordance with R.C. 2929.05(A), we are required to undertake a three-part review. First, we must review the judgment and consider the issues as we are required to do in all criminal cases. Second, we must independently weigh the evidence disclosed in the record and determine whether the aggravating circumstance the appellant was found guilty of committing outweighs the mitigating factors beyond a reasonable doubt. Finally, we must decide whether the sentence of death is appropriate after considering whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. For the reasons set forth below, we affirm the judgment of conviction and uphold the sentence of death.

I

A

Appellant asserts, by supplemental brief, that the three-judge panel committed prejudicial error in considering victim impact evidence in its sentencing decision. Appellant makes two claims: (1) the Ohio Revised Code does not authorize the introduction of victim impact evidence in a capital case, and (2) such evidence is inflammatory and prejudicial, and therefore denies a fair sentencing determination as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution. We address these issues in light of the United States Supreme Court's recent decision in *Booth* v. *Maryland* (1987), 482 U.S. ____, 96 L. Ed. 2d 440.

In *Booth*, the court invalidated a provision in a Maryland statute which required consideration of a victim impact statement during sentencing proceedings,[1] holding that the introduction of such evidence during the sentencing phase of a capital murder trial violates the Eighth Amendment to the United States Constitution. *Id.* at ____, 96 L. Ed. 2d at 452.

The defendant in *Booth* had been found guilty of the robbery and murder of an elderly couple. Prior to capital sentencing, the prosecutor read a victim impact statement to the jury which described the personal characteristics of the victims, the emotional impact of the crimes on their family, and recited the family's opinions and characterizations of both the crimes and the defendant.

The court determined that the information supplied in a victim impact statement "* * * is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* at ____, 96 L. Ed. 2d at 448. The court reasoned that victim impact statements focus on the character and reputation of the victim and the effect of the crime on family members, which factors may not be related to the culpability of the defendant or the decision to kill. The court further stated that "[t]his evidence thus could divert the jury's attention from the defendant's background and record, and the circumstances of the crime." *Id.* at ____, 96 L. Ed. 2d at 450. Finally, the court noted that the formal presentation of the grief and anger experienced by the family served to inflame the jury, and concluded that "[t]he admission of these emotionally-charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decision-making we require in capital cases." (Footnote omitted.) *Id.* at ____, 96 L. Ed. 2d at 452.

In the case *sub judice*, the presentence investigation report, submitted to the three-judge panel, contained a victim impact statement which summarized the effect of Helen Vantz's murder on her family, the impact of her loss on their daily lives, as well as the family's belief that the defendant should receive the death penalty. In addition, one of Vantz's sons was permitted to address the panel during the mitigation hearing.

Before applying the principles enunciated in *Booth*, *supra*, to the facts at bar, we will examine the admissibility of victim impact evidence in capital sentencing hearings under Ohio law. Unlike the Maryland statute involved in *Booth*, R.C. 2929.03(D)(1) does not expressly authorize the inclusion of victim impact evidence in pre-sentence investigation reports.

We further note that R.C. 2947.051(A), 2929.12 and 2929.14, which collectively sanction the preparation and consideration of victim impact statements during sentencing determinations, provide that a victim impact statement may be considered only in determining the minimum term of an indefinite sentence for a felony or when imposing a fine for a felony.[2]

Finally, R.C. 2943.041, which gives the victim or family representative the right to be present at the plea stage and to make a statement with regard to sentencing, is inapplicable to cases wherein the defendant has been charged with a capital offense. R.C. 2943.041(A).

Based on the foregoing, we find error in the admission of the victim im-

[1] Md. Ann. Code, Article 41, Section 4-609(d) (1986) provides in part:

"In any case in which the death penalty is requested * * *, a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted * * *."

[2] R.C. 2947.051(A) provides:

"(A) In all criminal cases in which a person is convicted of * * * or pleads no contest to and is found guilty of a felony, the court shall, prior to sentencing the offender, order the preparation of a victim impact statement by the department of probation of the county in which the victim of the offense resides, by the court's own regular probation officer, or by a victim assistance program that is operated by the state, any county or municipal corporation, or any other governmental entity if the offender caused, attempted to cause, threatened to cause, or created the risk of physical harm to the victim of the offense. *The court shall, in accordance with sections 2929.12 and 2929.14 of the Revised Code, consider the victim impact statement in determining the sentence to be imposed upon the offender.*" (Emphasis added.)

R.C. 2929.12(A) provides:

"(A) In determining the minimum term of imprisonment to be imposed for a felony for which an indefinite term of imprisonment is imposed, the court shall consider * * * the victim impact statement prepared pursuant to section 2947.051 of the Revised Code, if a victim impact statement is required by that section * * *."

R.C. 2929.14(A) provides:

"(A) In determining whether to impose a fine for a felony and the amount and method of payment of a fine, the court shall consider * * * the victim impact statement prepared pursuant to section 2947.051 of the Revised Code * * *."

THE STATE OF OHIO, APPELLEE, v. POST, APPELLANT.

[Cite as *State* v. *Post* (1987), 32 Ohio St. 3d 380.]

Criminal law—Aggravated murder—Attorney-client privilege waived, when—Trier of fact not required to compare mitigating factors in prior cases to those in subject case—R.C. 2929.03(D)—Death penalty upheld.

O.Jur 3d Criminal Law § 1841.

1. A client's disclosure to a third party of communications made pursuant to the attorney-client privilege breaches the confidentiality underlying the privilege, and constitutes a waiver thereof.
2. In determining sentence under R.C. 2929.03(D), the trial court, jury or three-judge panel is not required to compare the mitigating factors established in prior cases with the mitigating factors presented in the case before it.

(No. 86-425—Decided September 16, 1987.)

APPEAL from the Court of Appeals for Lorain County.

In the early evening of December 14, 1983, the defendant, Ronald Post, met with Jeff Hoffner in Elyria, Ohio. They picked up Ralph Hall, who brought with him a .22 caliber handgun. The three drove around in Post's car, discussing the possibility of robbing several establishments in the area.

The three made an unsuccessful robbery attempt on the manager of an IGA in North Eaton, Ohio. Driving back to Elyria, they discussed robbing the Slumber Inn and decided to investigate the possibilities. Post parked in the lot next to the inn and went inside while the other two waited in the car.

Inside, Post found Carol Bokar, a previous acquaintance, working as the desk clerk. He told her he had come to inquire into room rates and that he might need a place to stay.

When Post returned to the car, the three decided not to rob the Slumber Inn. Post returned Hall to the Colonial Motel at which time he obtained Hall's handgun. Post then dropped Hoffner off in Elyria.

Alone, and without the knowledge of Hoffner or Hall, Post returned to the Slumber Inn where he initiated another conversation with Carol Bokar. Carol introduced him to Mrs. Helen Vantz, who was to relieve Carol on the desk shift. Post accompanied Carol as she checked motel rooms for a possible problem. Carol then reported the day's activities to Vantz and told her that Post might return for a room. Post and Carol left together and proceeded to the Jackson Hotel where they met Sandy Collins, a friend of Carol. They stayed until about 2:15 a.m.

At approximately 3:00 a.m., Post, armed with the handgun, returned alone to the Slumber Inn. His plan was to kill Vantz and steal whatever he could find. At the Slumber Inn, Post engaged Mrs. Vantz in conversation until past 4:00 a.m., when she made a wake-up call to room number 30. Her next wake-up call, scheduled for 6:00 a.m., was never made.

Sometime between 4:00 a.m. and 6:00 a.m., Vantz, while sitting at her desk working on the nightly accounts, was shot from behind, in the head, by Post. Post shot her a second time to make sure she was dead. The body was later found, slumped at the desk, a pencil clasped in the hand. After shooting Vantz, Post collected certain items of value, including a bank deposit bag containing approximately $100, and Vantz's handbag.

Post then drove to North Ridgeville where he met with Ralph and Debbie Hall. Post told the Halls what he had done and gave Ralph the gun for disposal. Post then went to the home of James Harsh in order to persuade Harsh to say that Post had been at the Harsh residence between the hours of 2:30 a.m. and 7:30 a.m. that day. Later, Post admitted to Harsh that he had killed and robbed Vantz. Harsh then refused to support the alibi. Post also admitted his involvement in the crime to several others including David Thacker, Richard Slusher, Jeff Hoffner and John Thompson. Post admitted to two Elyria police detectives that he had told Thacker he was the perpetrator of the crimes.

On April 17, 1984, Post was indicted on one count of aggravated robbery with a firearm specification (count one); one count of aggravated murder under R.C. 2903.01(A), with a specification that the offense was committed while Post was committing or attempting to commit aggravated robbery, and that Post was the principal offender or committed the murder with prior calculation and design, and with a firearm specification (count two); and one count of aggravated murder under R.C. 2903.01(B), with the same specifications as enumerated in count two above (count three).

Post pleaded not guilty; however, he changed his plea to no contest pursuant to an agreement that he would be permitted to change a previously submitted motion *in limine* to a motion to suppress, without objection by the state. A panel of three judges accepted Post's plea and received the statement of facts proffered by the state.

On November 30, 1984, the three-judge panel found Post guilty on all counts and specifications contained in the indictment. The state subsequently elected to proceed on counts one and two with specifications for sentencing purposes.

On March 12, 1985, the three-judge panel convened to hear evidence of the aggravating circumstances and mitigating factors, and to impose sentence. The next day the panel announced that the state had proved one aggravating circumstance beyond a reasonable doubt, to wit: that Post was the principal offender and had committed a murder while committing an aggravated robbery and in possession of a firearm.

The panel further found that Post, age twenty-four, was not a youthful offender. It considered Post's history of criminal convictions and delinquency adjudications. While the panel found no deliquency adjudications, it did find the existence of misdemeanor convictions reflecting a tendency to violence. The panel also considered the "no contest" plea and found that such failed as an act of contrition.

The panel unanimously found that the state proved the aggravating circumstance beyond a reasonable doubt, that the defendant did not prove mitigating factors by a preponderance of the evidence, and that the sentence of death should be imposed. As to the aggravated robbery offense, a sentence of ten to twenty-five years' imprisonment was imposed and an additional three-year sentence was imposed on the firearm specification.

The court of appeals affirmed the aggravated murder conviction and found that the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt. The

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universally conceded." 8 Wigmore, *supra*, at 599, Section 2311. (Footnotes omitted.) Cf. *Emley* v. *Selepchak* (1945), 76 Ohio App. 257, 31 O.O. 558, 63 N.E. 2d 919.

Thus, it has been held that "[c]ommunications divulged to strangers or outsiders can scarcely be considered confidential communication between attorney and client," and are not protected by the attorney-client privilege. *United States* v. *Cochran* (C.A. 5, 1977), 546 F. 2d 27, 29; *United States* v. *Gordon-Nikkar* (C.A. 5, 1977), 518 F. 2d 972, 975. See *Whigham* v. *Banson* (1928), 21 Ohio App. 496, 505-506, 153 N.E. 252, 255; *Holland* v. *State* (1920), 17 Ala. App. 503, 504, 86 So. 118, 119.

We hold that a client's disclosure to a third party of communications made pursuant to the attorney-client privilege breaches the confidentiality underlying the privilege, and constitutes a waiver thereof. In ruling that the confession to Holmok was admissible, the trial court did not commit error.

We further note that the statement of facts submitted to the court, subsequent to appellant's no contest plea, did not refer to the confession made to Holmok. The Holmok evidence was included in the record upon the insistence of appellant's counsel, for the purposes of appeal. Moreover, the statement of facts revealed that appellant confessed to several persons that he murdered Vantz. Appellant made no objection to the inclusion of these admissions in the record nor did he contest the verity of those statements.

C

In his second proposition of law, appellant contends that his plea of no contest did not represent a voluntary and intelligent choice among the alternatives available to him, and therefore acceptance of the plea constituted plain error. Appellant argues that (1) he did not voluntarily waive his constitutional rights since the court failed to establish a factual basis for the plea, and (2) the plea could not be reconciled with his claim of innocence.

Crim R. 11(B)(2) states that a plea of no contest is not an admission of the defendant's guilt, but is an admission of the facts alleged in the indictment, information, or complaint. Before accepting a no contest plea, the court must ascertain whether the defendant's plea has been made knowingly and voluntarily with a full understanding of the effect of his plea. Crim. R. 11(C)(2) and (3).[4] Contrary to

[4] Crim. R. 11(C) provides in relevant part:

"* * *

"(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

"(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.

"(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.

"(c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.

"(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea. * * *"

appellant's assertion, however, Crim. R. 11 does not require the trial court to establish a factual basis for the plea before its acceptance. See *State* v. *Ricks* (1976), 48 Ohio App. 2d 128, 2 O.O. 3d 104, 356 N.E. 2d 312. See, also, *Roddy* v. *Black* (C.A. 6, 1975), 516 F. 2d 1380, 1385, certiorari denied (1975), 423 U.S. 917. *Hawk* v. *Berkemer* (C.A. 6, 1979), 610 F. 2d 445, 447, 18 O.O. 3d 396, 398, fn. 2; *King* v. *Perini* (N.D. Ohio 1976), 431 F. Supp. 481, 483, fn. 2.

Appellant relies principally on *dicta* in *North Carolina* v. *Alford* (1970), 400 U.S. 25, 38, 56 O.O. 2d 85, 91, fn. 10, wherein the court cautioned that guilty pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea. Nonetheless, the court in *Alford* found no constitutional bar to accepting a guilty plea in the face of an assertion of innocence provided a defendant voluntarily, knowingly and understandingly consents to sentencing on a charge. *Id.* at 37-38, 56 O.O. 2d at 91. Further, no constitutional error was found in accepting a guilty plea which contained a protestation of innocence, if the defendant intelligently concludes that his interests require entry of a guilty plea and if the record before the court contains strong evidence of guilt. *Id.*[5]

Turning to the facts at bar, we recognize that appellant asserted his innocence during the court-ordered psychological examination conducted in preparation of the pre-sentence report; however, the report was not before the court at the time appellant's plea was entered. There is no probative evidence in the record that appellant otherwise coupled his plea with a protestation of innocence. In addition, there is convincing proof in the record that appellant understood the effect of his no contest plea, and that such plea was made knowingly and intelligently.

At the plea hearing, appellant submitted a nine-page petition to withdraw his prior plea of not guilty and enter a plea of no contest. The petition states, *inter alia*, that appellant had been advised of the charges against him and apprised of the penalties for each offense if convicted. Further, the petition admitted the truth of all the facts alleged in the indictment, and requested the court to accept appellant's no contest plea in accordance with the terms of the petition and the negotiations entered into between his counsel and the state. Before accepting appellant's plea, the court reviewed the petition in detail with appellant, engaging in an extensive colloquy with him to insure that he was fully aware of his constitutional rights and understood the consequences of his plea. Under these facts, we conclude that appellant's no contest plea was valid and properly accepted by the panel.

D

In his third proposition of law, appellant raises the claim of ineffective assistance of counsel both at the guilt and sentencing phases of his trial. Appellant asserts that he was misguided into entering a plea of no contest though he received no benefit from the relinquishment of his constitutional rights. He further argues that defense

[5] We note that although *Alford*, *supra*, involved a guilty plea, Crim. R. 11(C) applies to both no contest and guilty pleas; therefore, the rulings in *Alford* apply with equal force here.

pact evidence. However, we are not persuaded that such error warrants reversal. The risks of arbitrary and prejudicial sentencing which guided the court in *Booth* are not present in the case *sub judice* because this case was before a three-judge panel rather than a jury.

We addressed the admissibility of victim evidence in a capital case tried to the court in *State* v. *White* (1968), 15 Ohio St. 2d 146, 44 O.O. 2d 132, 239 N.E. 2d 65, and held at paragraph two of the syllabus:

"The use by the state of evidence of the victim's background, and reliance upon such evidence in its argument for the death penalty, is improper and constitutes error, but while such error may be cause for reversal because of its prejudicial effect on a jury, it must affirmatively appear that in a bench trial the court relied on such testimony in arriving at its verdict in order for such error to be ground for reversal."

We further stated that this court indulges "* * * in the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *Id.* at 151, 44 O.O. 2d 136, 239 N.E. 2d 70. See *United States* v. *Impson* (C.A. 5, 1977), 562 F. 2d 970, 971, certiorari denied (1978), 434 U.S. 1050; *United States, ex rel. Placek*, v. *Illinois* (C.A. 7, 1976), 546 F. 2d 1298, 1304-1305; *United States* v. *Hughes* (C.A. 5, 1976), 542 F. 2d 246, 248. See, also, *United States* v. *Busch* (C.A. 10, 1985), 758 F. 2d 1394, 1398; *United States* v. *Greathouse* (C.A. 7, 1973), 484 F. 2d 805, 807; McCormick, Evidence (3 Ed. Cleary Ed. 1984) 153, Section 60; 1 Wigmore, Evidence (Tillers Rev. 1983) 212-216, Section 4d.1. See, generally, Note, Improper Evidence in Nonjury Trials: Basis for Reversal? (1965), 79 Harv. L. Rev. 407.

In the case at bar, the three-judge panel noted in its written opinion that they *heard* the statement of Helen Vantz's son on behalf of the family. It was further noted that "* * * [i]n their deliberations, pursuant to O.R.C. 2929.04(B) *the panel considered and weighed* against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character and background of the offender, and particularly the factors stressed by defense counsel * * *." (Emphasis added.) No reference was made to use of the victim impact evidence in the weighing process.

Absent an indication that the panel was influenced by or considered the victim impact evidence in arriving at its sentencing decision, the admission of the victim impact statement as well as permitting the victim's son to address the court at the mitigation hearing did not constitute prejudicial error.

B

In his first proposition of law, appellant asserts that the state's use of a confession written by a polygraph expert and signed by appellant (as well as the polygrapher's testimony) violated his attorney-client privilege, his right against self-incrimination, right to effective assistance of counsel, right of meaningful access to the courts, and due process.

Robert Holmok, a polygraph expert, was retained by appellant's counsel in preparation of the defense in the case. As a result of Holmok's interview, appellant signed the following statement:

"The following statement is only to be given to my attorney Ernie Hume + is not to be admitted in court against me.

"I did the robbery of the Slumber Inn + shot the clerk, Helen. /s/"

During a hearing on appellant's motion *in limine* to exclude Holmok's testimony, the state proffered the testimony of Richard Slusher who was appellant's fellow inmate at the county jail. Slusher testified that appellant admitted signing a written confession in relation to the polygraph examination and admitted that the confession was true.

The trial court ruled the written statement as well as Holmok's testimony admissible, holding that while the appellant's admissions may have been initially protected as privileged communication or work product, appellant's disclosure to Slusher waived the privilege.

The parties have not disputed the proposition that communications made by appellant to Holmok fall under purview of the attorney-client privilege. The privilege includes communications through persons acting as the attorney's agents. 8 Wigmore, Evidence (McNaughton Rev. 1961) 618-619, Section 2317. See *Foley* v. *Poschke* (1941), 137 Ohio St. 593, 19 O.O. 350, 31 N.E. 2d 845; *Bowers* v. *State* (1876), 29 Ohio St. 542. Some jurisdictions have held that statements made to polygraph experts are protected by the attorney-client privilege from disclosure. *State* v. *Rickabaugh* (S.D. 1985), 361 N.W. 2d 623; *Brown* v. *State* (Ind. 1983), 448 N.E. 2d 10; *People* v. *George* (1980), 104 Misc. 2d 630, 428 N.Y. Supp. 2d 825; *People* v. *Marcy* (1979), 91 Mich. App. 399, 283 N.W. 2d 754; Annotation, Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Third Person (1982), 14 A.L.R. 4th 594, 641-643. We agree. Thus, we must decide whether the privilege was waived by disclosure of the communications.

Appellant contends he did not waive the privilege since he did not expressly consent to waiver and he did not voluntarily testify or authorize Holmok to testify.[3]

However, in *Travelers Indemnity Co.* v. *Cochrane* (1951), 155 Ohio St. 305, 316, 44 O.O. 302, 307, 98 N.E. 2d 840, 846, this court determined that the attorney-client privilege is destroyed by voluntary disclosure to others of the content of the statement. See *United States* v. *Jones* (C.A. 4, 1982), 696 F. 2d 1069, 1072; *In re Sealed Case* (D.C. App. 1982), 676 F. 2d 793, 808-809; *United States* v. *Aronoff* (S.D. N.Y. 1979), 466 F. Supp. 855, 862. See, also, 8 Wigmore, *supra*, at 601-603, Section 2311; McCormick, Evidence, *supra*, 227, Section 93. Waiver of the attorney-client privilege by disclosure to third parties is premised on the principle that "[t]he privilege assumes, of course, that the communications are made with the intention of confidentiality. The reason for prohibiting disclosure * * * ceases when the client does not appear to have been desirous of secrecy. 'The moment confidence ceases,' said Lord Eldon, 'privilege ceases.' This much is

[3] Our attention is called to R.C. 2317.02, which provides in part:

"The following persons shall not testify in certain respects:

"(A) An attorney, concerning a communication made to him by his client in that relation or his advice to his client; but the attorney may testify by express consent of the client, or if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of such deceased client; and if the client voluntarily testifies, *the attorney may be compelled to testify* on the same subject * * *." (Emphasis added.)

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of the evidence. We hold that pursuant to R.C. 2929.04(B), the panel did not err in attributing no weight to the evidence presented in mitigation of the offense.

F

In his fifth proposition of law, appellant asserts that he was condemned to death arbitrarily and capriciously since the three-judge panel rejected the evidence he submitted as mitigating while finding that similar factors were mitigating in prior Lorain County cases.[7]

Appellant has confused the sentencing court's responsibility under R.C. 2929.03(D) to consider the testimony and evidence presented during mitigation proceedings with a reviewing court's duty under R.C. 2929.05(A) to determine whether the sentence of death is appropriate in relation to the penalty imposed in similar cases.

R.C. 2929.03(D)(1) neither prescribes nor precludes the court or jury from considering evidence determined to be mitigating in similar cases. R.C. 2929.03(D)(1) requires the court or jury to consider the testimony and other evidence relevant to the aggravating circumstances the offender was found guilty of committing as well as "* * * the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death * * *." The defendant is to be given great latitude in presenting evidence of any mitigating factors. Arguably this could include the mitigating factors established in cases involving similar offenses.

The sentencing procedures in R.C. 2929.03(D)(1) are designed to promote objective consideration of the circumstances of the individual offense and the individual offender. To ask a jury or panel to make comparisons with the mitigating factors in other cases would be to send the jury or panel into the quagmire of weighing evidence in those other cases. Such would detract from, rather than further, the individual consideration which the defendant, standing at bar, should be given.

The proportionality review set forth in R.C. 2929.05(A) provides an additional safeguard against arbitrary or capricious sentencing. "The fundamental purpose behind proportionality review is to ensure that sentencing authorities do not retreat to the pre-*Furman* era when sentences were imposed arbitrarily, capriciously, and indiscriminately. To achieve this result, state courts traditionally compare the overall course of conduct for which a capital crime has been charged with similar courses of conduct and the penalties inflicted in comparable cases." *State* v. *Jenkins* (1984), 15 Ohio St. 3d 164, 176-177, 15 OBR 311, 322, 473 N.E. 2d 264, 279, certiorari denied (1985), 472 U.S. 1032, rehearing denied (1985), 473 U.S. 927.

Based on the foregoing, we hold that in determining sentence under R.C. 2929.03(D), the trial court, jury or three-judge panel is not required to compare the mitigating factors established in prior cases with the mitigating factors presented in the case before it. Therefore, the panel did not err in concluding that appellant had not proven any factors in mitigation despite alleged findings that similar factors were established as mitigating in prior cases.

G

Appellant contends in his sixth proposition of law that the three-judge panel committed prejudicial error in omitting from its opinion the reasons the aggravating circumstance outweighed the mitigating factors beyond a reasonable doubt, as required by R.C. 2929.03(F).

In its opinion the panel determined that the state proved the aggravating circumstance beyond a reasonable doubt, and that appellant did not prove any mitigating factors by a preponderance of the evidence. The difficulty stems from the panel's failure to state that the aggravating circumstances appellant was found guilty of committing outweighed the mitigating factos beyond a reasonable doubt and the reasons therefor.

We recently addressed a similar issue in *State* v. *Byrd* (1987), 32 Ohio St. 3d 79, ___ N.E. 2d ___. In that case the trial court found that the evidence did not support any mitigating factors, and concluded that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. The court did not specifically state the reasons the aggravating circumstances were sufficient to outweigh the mitigating factors. We determined that "[i]n the absence of any mitigating factors, this is the only logical conclusion." *Id.* at 85, ___ N.E. 2d at ___. (Emphasis added.)

The same reasoning is applicable to the case *sub judice*. It is evident from the panel's opinion that it considered the aggravating circumstance appellant was found guilty of committing and weighed it against those factors presented in mitigation. Implicit in the panel's finding that no mitigating factors were proven is the deduction that there were no mitigating factors to be outweighed by the aggravating circumstance.[8]

H

In his seventh proposition of law, appellant contends that the sentence of death must be reversed where the mitigating factors are not outweighed by the aggravating circumstances. We address this issue in Part II of this opinion, *infra*, pursuant to our duty to independently weigh the aggravating circumstances against the mitigating factors. See R.C. 2929.05(A).

I

Appellant, in his eighth proposition of law, challenges the constitutionality of the proportionality review mandated in R.C. 2929.05(A).

We addressed the points raised by appellant in *State* v. *Steffen*, *supra*, where we held at paragraph one of the syllabus:

"The proportionality review required by R.C. 2929.05(A) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed."

We further ruled that "* * * [n]o reviewing court need consider any case where the death penalty was sought

[7] Appellant submits that at the time he was indicted there were four previous capital murder indictments in Lorain County in which the death penalty was not imposed following a plea of guilty.

[8] We do not condone noncompliance with R.C. 2929.03(F) by sentencing courts. The failure of a trial court or three-judge panel to fully articulate its findings and reasoning under R.C. 2929.03(F) disrupts the review procedures enacted by the Ohio Legislature. See *State* v. *Maurer* (1984), 15 Ohio St. 3d 239, 247, 15 OBR 379, 386, 473 N.E. 2d 768, 778, certiorari denied (1985), 472 U.S. 1012, rehearing denied (1985), 473 U.S. 924.

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counsel failed to establish a single mitigating factor.

In *Strickland* v. *Washington* (1984), 466 U.S. 668, the United States Supreme Court enunciated the following two-pronged standard for determining whether counsel's assistance was ineffective:

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. The *Strickland* standard was recently approved in *Burger* v. *Kemp* (1987), 483 U.S. ___, 97 L. Ed. 2d 638. Accord *State* v. *Smith* (1985), 17 Ohio St. 3d 98, 100, 17 OBR 219, 220-221, 477 N.E. 2d 1128, 1131; *State* v. *Lytle* (1976), 48 Ohio St. 2d 391, 395, 2 O.O. 3d 495, 497, 358 N.E. 2d 623, 626, vacated in part on other grounds (1978), 438 U.S. 910.

The court in *Strickland* noted that "[j]udicial scrutiny of counsel's performance must be highly deferential * * *," and "* * * a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *." *Strickland*, *supra*, at 689.

In applying these standards to the case *sub judice*, we find that appellant fails to meet his burden. Of course, many trial tactics may be questioned after an unfavorable result. A fair assessment of attorney performance requires us to eliminate the distorting effect of hindsight. Here, the record reveals that the change in plea was part of a strategy designed to preserve, for appellant review, the trial court's ruling on the motion *in limine*. Further, defense counsel was faced with overwhelming evidence of guilt, including several confessions by the appellant.

We disagree with appellant's contention that counsel failed to zealously represent him during the mitigation phase of the trial. The case at bar is distinguishable from *State* v. *Johnson* (1986), 24 Ohio St. 3d 87, 24 OBR 282, 494 N.E. 2d 1061, in which we vacated the death sentence after determining that defense counsel did not discuss the penalty phase with his client, had little time to present evidence of mitigating factors, and displayed a lack of preparation.

Here, defense counsel obtained stipulations as to the age of appellant; that he had no previous felony or juvenile record; and that the death penalty had not been imposed in any prior cases in Lorain County involving the charge of aggravated murder. In addition, defense counsel offered the testimony of appellant's common-law wife, stepmother and mother. The record shows that defense counsel conducted a thorough examination of each witness and elicited positive testimony relating to appellant's family life, his behavior, disposition and potential for rehabilitation. Counsel presented the testimony of Jane Core of the Ohio Public Defender Commission reporting the status of capital sentencing in the state of Ohio. Finally, appellant gave an unsworn statement during which he asked the victim's family for forgiveness, and begged for mercy from the three-judge panel. While these offerings carry little mitigating weight, as balanced against the appellant's aggravated murder conviction, we find that counsel presented the case in mitigation competently, and did the best they could with the facts available to them. *Burger*, *supra*. We are not impressed by the lengthy list of additional mitigating evidence that appellant says should have been introduced at the mitigation stage. As this court stated in *Lytle*, *supra*, at 396, 2 O.O. 3d at 498, 358 N.E. 2d at 627:

"We deem it misleading to decide an issue of competency by using, as a measuring rod, only those criteria defined as the *best of available practice* in the defense field. There are many attorneys who fail to use the best available practices, yet relatively few who are found to be incompetent." (Emphasis *sic*.)

E

In his fourth proposition of law, appellant argues that the three-judge panel violated R.C. 2929.04(B) by failing to consider all the evidence presented in mitigation. Review of the panel's opinion shows that it considered each factor submitted in mitigation of the offense.[6]

Appellant further argues that the panel failed to weigh the mitigating evidence since the panel found that no mitigating factors existed. Although R.C. 2929.04(B) requires a trial court or three-judge panel to *consider* the factors enumerated therein, "* * * it does not require that court or panel to find that such evidence *establishes* a mitigating factor or factors." (Emphasis added.) *State* v. *Stumpf* (1987), 32 Ohio St. 3d 95, 101, ___ N.E. 2d ___, ___. See, also, *State* v. *Steffen* (1987), 31 Ohio St. 3d 111, 129, 31 OBR 273, 289, 509 N.E. 2d 383, 399.

The panel in the case at bar concluded that appellant did not prove any mitigating factors by a preponderance

[6] The panel specified in its opinion that, pursuant to R.C. 2929.04(B), it considered and weighed against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, and the history, character and background of the offender. The panel further stated that it considered, "* * * particularly the factors stressed by defense counsel, viz:

"O.R.C. 2929.04(B)(4) The youth of the offender.

"The panel considered the age of the defendant and found that *he* was not a youthful offender.

"O.R.C. 2924.04(B)(5) The offender's lack of significant history of prior criminal convictions and delinquency adjudications.

"The panel found no delinquency adjudications. The panel found the misdemeanor convictions reflected a tendency to violence.

"O.R.C. 2929.04(B)(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

"The panel considered under this factor of mitigation:

"1. The 'no contest' plea. The panel found this failed as an admission by the offender.

"2. The argument that this sentence should be proportionate to sentences of other capital crimes in Lorain County and the State of Ohio. The panel found such inapplicable as a mitigating factor under the case law of *Pully* v. *Harris*, 79 L. Ed. 2d 29; *State* v. *Jenkins*, 15 [Ohio St.] 3d 164, at page 208.

"3. Statement of the offender.

"The panel considered this factor in mitigation of possible sentence.

"4. The unindicted supplier of the weapon.

"The panel considered this statement of counsel in argument, but found no evidence to support the statement.

"Based upon all of the foregoing, the panel found unanimously that the state has proved the aggravat[ing] circumstances beyond a reasonable doubt, and the defendant did not prove the mitigating factors by a preponderance of the evidence, and the sentence of death should be imposed. * * *"

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mitigating factors as required under R.C. 2929.05(A).

Appellant was sentenced on the basis of having been found guilty of one aggravating circumstance proved beyond a reasonable doubt, *viz.*: that he committed a murder while committing an aggravated robbery in possession of a firearm, and that he was the principal offender.

Against this aggravating circumstance we weigh all mitigating factors drawn from: (1) the nature and circumstances of the offense, (2) the history, background and character of appellant, and (3) any of the factors listed in R.C. 2929.04(B)(1) through (7) which exist in this case.

We find nothing in the nature and circumstances of Vantz's murder to mitigate appellant's offense.

We have reviewed the evidence submitted by appellant in relation to his history, background and character. The psychological evaluation submitted on appellant's behalf states that "* * * he is not a psychiatrically disturbed individual * * *. Rather, he [is] a marginally adjusted individual who copes with life's problems ineffectively and who lacks maturity and sound judgement [*sic*] that are common to reasonably well-adjusted adults." The report further indicates that appellant's past conduct does not reflect serious anti-social or violent behavior, although it notes his minor drug involvement. We attribute little mitigating weight to this evidence.

At the mitigation hearing, Post's common-law wife, mother and stepmother testified on his behalf. Their testimony reflected that he was a loving, non-violent person and a caring father with two sickly children who need him. We find that these factors carry minimal weight as mitigating given the nature of the crime. Post's mother, common-law wife and stepmother characterized him as a follower, not a leader; however, this evidence is rebutted by the fact that he acted alone. Accordingly, we give this evidence no weight as a mitigating factor.

We have examined Post's unsworn statement asking the victim's family for forgiveness and find that retrospective remorse is to be accorded little weight in mitigation of sentence. Appellant also introduced statistics establishing that at the time of his conviction only one defendant had been sentenced to death of the twenty no contest or guilty pleas entered for aggravated murder. These statistics have no mitigating value in this case.

Focusing now on the mitigating factors delineated in R.C. 2929.04(B)(1) through (7), we conclude that the victim neither induced nor facilitated the offense; that appellant was under no apparent duress, coercion, or strong provocation; and that appellant suffered from no known mental disease or defect which would have impaired his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. Therefore, the factors contained in R.C. 2929.04(B)(1), (2) and (3) are inapplicable to the case at bar. We further find that the factor found in R.C. 2929.04(B)(6) is inapplicable to the case at bar since Post was determined to be the principal offender.

Pursuant to R.C. 2929.04(B)(4), we have considered appellant's age (twenty-four) at the time of the offense and find that it is not a mitigating factor. As we stated in *Byrd, supra*, at 81, ___ N.E. 2d at ___, "[a]lthough R.C. 2929.04(B) lists youth as a factor to be considered, it does not require anyone under a certain age to be absolved of culpability for his crime." This is true particularly where there is "* * * no evidence to suggest that * * * age [is] of any relevance in the crime or sentence of death." *Id.*

The pre-sentence investigation report reveals that appellant had no prior arrest history as a juvenile. See R.C. 2929.04(B)(5). Nonetheless, as an adult, Post was convicted of the following misdemeanor offenses: vandalism, shoplifting, possession of a dangerous ordnance, theft and assault. We accord no weight to this evidence as mitigating.

Finally, the appellant entered a no contest plea to the charges in the indictment. The entry of said plea was inspired by an appeal strategy and, thus, we give little weight to this factor.

Based on the foregoing, we conclude that the aggravating circumstance outweighs the factors presented in mitigation beyond a reasonable doubt.

III

Our final task is to determine whether the sentence of death is appropriate. In discharging this duty pursuant to R.C. 2929.05(A), we have compared the sentence in this case with those cases we have previously reviewed in which the death penalty has been imposed. See *Steffen* and *Stumpf, supra.*[10]

Having carefully considered the aforementioned cases, we find that, in comparison, the death sentence imposed in the case *sub judice* is appropriate and is neither excessive nor disproportionate.

IV

In conclusion, we uphold appellant's conviction and sentence of death. We are satisfied that the aggravating circumstance appellant was found guilty of committing outweighs the mitigating factors beyond a reasonable doubt. Finally, our proportionality review convinces us that the sentence of death is appropriate under the facts of this case.

Accordingly, the judgment of the court of appeals is hereby affirmed.

Judgment affirmed.

MOYER, C.J., SWEENEY, LOCHER, HOLMES, DOUGLAS and WRIGHT, JJ., concur.

[10] Our review establishes that we have upheld the death sentence as appropriate in the following cases involving aggravated robbery and murder: *State* v. *Martin* (1985), 19 Ohio St. 3d 122, 19 OBR 330, 483 N.E. 2d 1157, certiorari denied (1986), 474 U.S. ___, 88 L. Ed. 2d 808 (aggravated robbery-murder of drugstore owner and no significant evidence offered in mitigation); *State* v. *Williams* (1986), 23 Ohio St. 3d 16, 23 OBR 13, 490 N.E. 2d 906, certiorari denied (1987), 480 U.S. ___, 94 L. Ed. 2d 699, rehearing denied (1987), 481 U.S. ___, 95 L. Ed. 2d 537 (aggravated robbery-murder of elderly woman with meager evidence submitted in mitigation); *State* v. *Barnes* (1986), 25 Ohio St. 3d 203, 25 OBR 266, 495 N.E. 2d 922, certiorari denied (1987), 480 U.S. ___, 94 L. Ed. 2d 701 (murder of a night porter at a bar during commission of aggravated burglary and aggravated robbery); *State* v. *Scott* (1986), 26 Ohio St. 3d 92, 26 OBR 79, 497 N.E. 2d 55, certiorari denied (1987), 480 U.S. ___, 94 L. Ed. 2d 699, rehearing denied (1987), 481 U.S. ___, 95 L. Ed. 2d 538 (murder of delicatessen owner during aggravated robbery of her establishment); *State* v. *Byrd, supra* (murder of night clerk at store during course of aggravated robbery).

but not obtained or where the death sentence could have been sought but was not." *Id.* at 124, 31 OBR at 284, 509 N.E. 2d at 395. See, also, *Byrd, supra.*

The court below stated that there were no previous cases in Lorain County for comparison purposes; however, the court reviewed the sentencing opinions filed pursuant to R.C. 2929.03(F) and concluded that the death penalty in the case *sub judice* was not excessive or disproportionate to the penalty imposed in similar situations. The court of appeals discharged its duties under R.C. 2929.05(A).

J

In his ninth proposition of law, appellant, for the first time, raises the claim that the three-judge panel erred by failing to conduct a trial *de novo* as to the existence of the specified aggravating circumstance. Appellant argues that such is required by Crim. R. 11(C).[9]

Appellant asserts that since Crim. R. 11(C)(4) refers to non-capital cases, the three-judge panel must, under Crim. R. 11(C)(3), conduct an evidentiary hearing at which the state must prove the existence of the aggravating circumstances beyond a reasonable doubt.

By entering a no contest plea, the accused admits the truth of the facts alleged in the indictment (Crim. R. 11[B][2]), and further waives the right to require the state to prove his guilt beyond a reasonable doubt at a trial (Crim. R. 11[C][2][c]). By inference, an evidentiary hearing is not necessary for the determination of whether the offense is aggravated murder or a lesser offense as such determination is based upon the facts contained and admitted in the indictment, information or complaint.

Crim. R. 11(C)(3)(c), however, directs the court to "* * * proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly." This section implicitly refers to the bifurcated proceedings for capital offenses under Ohio law.

R.C. 2945.06 provides that when a plea of guilty (or as here a plea of no contest) has been entered, "* * * a court composed of three judges *shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly.* * * *" (Emphasis added.) R.C. 2945.06 further requires the court to follow the sentencing procedures contained in R.C. 2929.03 and 2929.04 in all cases where the offense is punishable by death.

We conclude that Crim. R. 11(C)(3)(c), when read *in pari materia* with R.C. 2945.06, requires the three-judge panel, upon acceptance of a no contest plea to the charge of aggravated murder, to hear evidence in deciding whether the accused is *guilty* of aggravated murder beyond a reasonable doubt.

In the case *sub judice*, the prosecutor read the statement of facts into the record after the court's acceptance of appellant's plea but prior to its determination of guilt. A fair reading of the transcript indicates that the parties agreed that the statement of facts proffered by the state would constitute the sole evidence of aggravating circumstances before the court. This is more clearly evidenced by the certificate of defense counsel which was read in open court and signed in appellant's presence. The last paragraph of this document reads:

"By voluntarily entering this plea of no contest, *Defendant understands that we, as his attorneys, will not contest nor deny the truth of the allegations contained in the prosecuting attorney's explanation of circumstances or statement of facts* to the Court of three Judges upon tendering said plea." (Emphasis added.)

Further, prior to the pronouncement of the court's guilt finding, the following dialogue took place between defense counsel and the court:

"MR. DUFF: I want to make it clear, Your Honor, that our no contest plea, as I understand the law, is that admission of the facts contained in the indictment, and I don't want that to be misconstrued in any way that we agree or concur in their statement of facts; that they're not a stipulated statement of facts, they're the prosecutor's statement of facts.

"JUDGE HARRIS: You don't have to agree or concur, but you were afforded the opportunity to present whatever you wanted to present in contradiction thereto; and you haven't presented anything, so the only thing this Court has is the statement of Mr. Nagy.

"MR. DUFF: All right. As long as that's understood."

Agreements, waivers and stipulations made by the accused, or by the accused's counsel in his presence, during the course of a criminal trial are binding and enforceable. See *State* v. *Robbins* (1964), 176 Ohio St. 362, 27 O.O. 2d 312, 199 N.E. 2d 742, paragraph two of the syllabus. Although R.C. 2945.06 requires the court to "examine the witnesses" in determining whether the accused is guilty of aggravated murder, we find that appellant was bound by the agreed-upon procedure wherein the state would proffer a statement of facts in lieu of witnesses or other evidence.

K

In his tenth and eleventh propositions of law, appellant challenges the constitutionality of the death penalty statute in Ohio. Specifically, appellant asserts that the mandatory sentencing scheme and those provisions governing the imposition of the death sentence violate the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I, of the Ohio Constitution. Appellant concedes that these arguments were previously addressed by this court in *State* v. *Jenkins, supra*, at 168-169, 172-173, 15 OBR at 315-316, 318-319, 473 N.E. 2d at 273-274, 276-277, and *State* v. *Maurer, supra*, at 241-242, 15 OBR at 381-382, 473 N.E. 2d at 773-775. We decline the invitation to overrule *Jenkins* and, therefore, reject appellant's propositions ten and eleven.

II

Having addressed the issues raised in appellant's propositions of law, we turn to an independent weighing of the aggravating circumstance and the

[9] Crim. R. 11(C) provides in relevant part:

"(3) * * * If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea * * * to the charge, or if pleas * * * to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense * * * (c) if the offense is determined to have been aggravated murder, *proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.*

"(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest." (Emphasis added.)

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STATE OF OHIO)
) ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO Plaintiff-Appellee v. RONALD RAY POST Defendant-Appellant	)	C.A. NO. 3868 APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT COUNTY OF LORAIN, OHIO CASE NO. 29194

DECISION AND JOURNAL ENTRY

Dated: January 15, 1986

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MAHONEY, J.

Ronald Ray Post appeals his conviction in the Lorain County Court of Common Pleas for aggravated murder in violation of R.C. 2903.01 and the imposition of the death penalty pursuant to R.C. 2929.02(A). We affirm.

FACTS

Post was indicted on April 17, 1984, and charged with aggravated robbery in violation of R.C. 2911.01 with a specification that he possessed a firearm at the time of the offense, and aggravated murder in violation of both R.C. 2903.01(A) and (B) with specifications that he was the principal offender during the commission of an aggravated

robbery and that the murder occurred during the course of an aggravated robbery. Post pled not guilty to each count at his arraignment and counsel was appointed to represent him.

Post's counsel hired a polygraph expert, Robert Holmok, to run a test on him. Holmok was a Lakewood, Ohio detective who also had a private polygraph business. While testing Post, Holmok persuaded him to sign the following confession:

> "The following statement is only to be given to my attorney...[and] is not to be admitted in court against me.
>
> "I did the robbery of the Slumber Inn and shot the clerk, Helen. /s/ Ronald Post."

Sometime later while in jail awaiting trial, Post told a detainee, Richard Slusher, in a neighboring cell that he had made a written confession to Holmok and once again confessed to the murder and robbery. The detainee passed this information on to the police who, in turn, told the prosecution about Post's confessions. Both the prosecution and Post's counsel filed motions to determine the admissibility of the confession made to Holmok. A hearing was held on November 20, 1984, after which the trial court held that even if the communication had originally been privileged, Post waived any such privilege through his disclosures to the neighboring detainee and that therefore it was admissible into evidence. Subsequently, Post's attorneys entered into a plea bargain wherein the appellant would enter a plea of no contest to all counts and specifications and the state would consent to the courts considering the various motions in limine as a

motion to suppress and the courts resulting order as a denial of suppression enabling that issue to be preserved for appeal.

On November 30, the change of pleas was entered and accepted by the trial panel. Defense counsel indicated that with one exception, it was agreed as part of the plea bargain that defense counsel would not contest or deny the statement of facts the prosecutor was going to read into the record.

The prosecutor then read the following statement of facts into the record:

"On December 14, 1983, at approximately 7:00 p.m., defendant Ronald Post met with Jeff Hoffner at the home of Stephanie Sears, 202-B Gateway Boulevard, Elyria, Ohio.

"Post and Hoffner then proceeded to the residence of Ralph Hall, who was residing with his wife, Debra, at the Colonial Motel, 38784 Center Ridge Road, North Ridgeville, Ohio. They picked up Hall, who brought with him a .22 caliber Model RG145 handgun, Serial Number Z073087.

"These three individuals then proceeded in Post's vehicle through North Ridgeville. While en route, they discussed robbing several different establishments in the area.

"Shortly thereafter, the three attempted to rob the manager of an IGA Store in North Eaton, Ohio.

"This attempt being foiled, they drove back toward Elyria.

"During the ride, they discussed robbing the Slumber Inn, 318 Griswold Road, Elyria, Ohio. They decided to go to the Slumber Inn to determine whether this could be accomplished.

"Upon arrival, the defendant parked his vehicle in a parking lot located adjacent to the Slumber Inn. While Hall and Hoffner waited in Post's vehicle, Post entered the Slumber Inn for the purpose of casing the area.

"While at the Slumber Inn, the defendant met Carol Bokar, the afternoon shift desk clerk. Post and Miss Bokar knew each other from years before.

"Post informed Miss Bokar that he was there for the purpose of checking out room rates, as he might need a place to stay. Post remained inside for a considerable length of time.

"Upon Post's returning to his vehicle, the three occupants decided that they would not complete the robbery.

"The defendant then drove back to the Colonial Motel, where he dropped off Hall. It was at this time that the defendant took possession of the .22 caliber handgun previously mentioned.

"Post and Hoffner proceeded back to Elyria, where Post dropped off Hoffner at 202-B Gateway Boulevard.

"The defendant, Ronald Post, without the knowledge of Hoffner or Hall, then drove back to the Slumber Inn. Post began another conversation with Carol Bokar.

"At approximately 12:15 a.m. on December 15, 1983, Mrs. Helen Vantz arrived for her shift as midnight desk clerk. Post was introduced to Mrs. Vantz by Carol Bokar as someone she had known in the past.

"While Mrs. Vantz was at the desk, Post accompanied Miss Bokar while she checked out one of the motel rooms for a possible problem. Post and Miss Bokar returned to the motel lobby, where Miss Bokar advised Mrs. Vantz of the day's activities.

"Miss Bokar indicated at this time that she was meeting a friend, Sandy Collins, at the Jackson Hotel, Elyria, Ohio. Miss Bokar also indicated to Mrs. Vantz that the defendant might return to the motel to obtain a room.

"Post and Bokar met Sandy Collins at the Jackson Hotel, where they stayed until approximately 2:15 a.m.

"By 3:00 a.m. on December 15, 1983, the defendant had returned to the Slumber Inn, armed with the handgun previously mentioned. His plan was to kill Mrs. Vantz and remove what valuables he could find from the Inn.

"The victim, Helen Vantz, having previously been advised that the defendant might return for purposes of obtaining lodging, allowed him to enter the lobby area.

"The defendant remained there, engaging the victim in conversation past the hour of 4:00 a.m., when she made a wake-up call to the occupants in Room Number 30.

"The next wake-up call scheduled to be made was 6:00 a.m. This call was never made.

"Sometime between the hours of 4:00 a.m. and 6:00 a.m. on December 15, 1983, at the Slumber Inn, 318 Griswold Road, City of Elyria, County of Lorain, and State of Ohio, the defendant, Ronald Post, carried out his plan to rob the Slumber Inn and murder Helen Vantz.

"As Mrs. Vantz was sitting at her desk preparing her nightly accounts, Post stationed himself just behind her right shoulder. From a distance of within six feet, the defendant murdered Mrs. Vantz by firing his handgun twice into her head. The defendant fired twice to insure that the victim was dead.

"One projectile entered the right occipital area, traversing the superior part of the cerebellum and lodging in the opposite lateral temporal parietal area.

"The other prjectile entered the right fronto-parietal area, traversing downward through Mrs. Vantz's right cerebral hemisphere and lodging in the basilar part of her occipital bone.

"The victim died as a result of these wounds, either of which would have been fatal.

"After killing Mrs. Vantz, the defendant, removed certain items of value from the premises, including a bank deposit bag containing approximately $100, property of the Slumber Inn, and a handbag containing various items belonging to the deceased.

"At approximately 7:00 a.m., Mrs. Vantz's body was discovered by an occupant of the motel who was in the process of checking out. The body was slumped in the desk chair, where she was working when she

was killed, and her pencil was still clasped in her hand. The Elyria Police Department received notification at 7:17 a.m.

"Meanwhile, the defendant began to execute his plan to cover up his crime. At approximately 5:00 a.m., he returned to North Ridgeville and advised Ralph and Debbie Hall of what he had done. Post asked Hall to dispose of the murder weapon.

"He then proceeded to the house of James Harsh, 225-A White Oak Drive, Elyria, Ohio, for the purpose of establishing an alibi. He obtained a commitment from Mr. Harsh to state that he arrived at the Harsh residence at approximately 2:30 a.m. and stayed there until 7:30 a.m., December 15, 1983.

"He later confessed to Mr. Harsh that he had killed Helen Vantz and robbed the Slumber Inn, thereby causing Mr. Harsh to recant his story as to the defendant's whereabouts the morning of the crimes herein.

"The defendant made several other incriminating statements outlining his sole involvement in these crimes to several individuals, including David Thacker, Richard Slusher, Jeff Hoffner, and John Thompson.

"The defendant admitted to detectives Medders and Jaykel of the Elyria Police Department on April 13, 1984, that he had previously told David Thacker that he was the perpetrator of these crimes."

Subsequently, the appellant did not admit, deny or contest the above factual statement except to request the inclusion of the testimony of polygrapher Holmok as to the purported confessional statement by Post. Thereupon, the sentencing was stayed pending completion of pre-sentence and mental examinations which the appellant had requested.

On March 12, 1985, Post came before the three-judge panel for sentencing. A hearing was conducted pursuant to statute. The state and the defense stipulated that Post was born

August 1, 1959 and was twenty-four years old when the murder was committed. Further, that he had no prior felony convictions or delinquency adjudications. The pre-sentence investigation and report as well as the W. G. Nord Center psychological evaluation of the defendant were stipulated into evidence. It was further stipulated that the death penalty under the new statute had not previously been imposed in Lorain County.

The defense offered four witnesses. They were Sharon Harsh Post, his common-law wife; Ruth Post, his stepmother; Helen Post, his natural mother; and Jane Core, a social investigator for the Ohio Public Defender Commission.

Sharon Harsh Post said that from their four-year relationship, she believed Ron was a follower, not a leader and that he was a kind and compassionate person. She stated that he was close to and supportive of Jessica, her four-year old daughter by another person and of Joshua, her one-year old son by Post. She indicated that both children were "crib-death" babies (S.I.D. Syndrome) and that Joshua has heart and stomach problems which have required surgery. She acknowledged that Ron smoked "pot" but denies he has any other drug involvement. She admitted he "smacked her around" a couple of times and that neighbors had called the police because of their family arguments.

Ruth Post, the stepmother, was married to Ron's father in 1976 until his death from lung cancer on January 21, 1981.

She related that Ron was very close to his father, and affected deeply by his death. She remembers that he interacted well with her younger children, but that neither she nor her children had seen Ron since 1981. In her opinion, Ron was not given to a temper or violence, but was a soft-hearted follower. She says he was always smiling and laughing and never needed disciplined.

Ron's mother, Helen Post, says that Ron lived with her until he was twenty-one. She described a good childhood, little league baseball, church youth federation and high school football. She believes Ron was very close to her and his father. They love each other and Ron loves his family. She evaluates him as a follower who associated with the wrong kind of people after he left home. She denied he was ever in any trouble and says he did not have a propensity to violence.

Jane Cores' duties are to keep the death penalty statistics at the Ohio Public Defender's Office. She identified a tracking exhibit she had prepared reflecting the current status of the capital indictments and specifying those in which a plea of guilty and no contest was entered. The exhibit was admitted into evidence. She testified that the records show three hundred forty-five capital indictments of which twenty resulted in guilty or no contest pleas with the death specification intact. Only one of those was a no contest plea. She said that only one of the twenty received the death penalty.

The defendant Ronald Post, made a statement in which he asked the court for mercy, and requested forgiveness from the Vantz family. He expressed his sorrow, saying he could not give any rational explanation for "my involvement in the death of Mrs. Helen Vantz."

After the defense and the state rested, the court heard the statement of the victim's son William H. Vantz, who spoke on behalf of the family. He said he could never forgive Mr. Post and that the family felt "she was executed...and...the only just punishment for execution is execution."

Thereupon, arguments of counsel were heard. The panel deliberated and unanimously found that the defendant had not proven any mitigating factors. They further found the state had proven the aggravated circumstance under R.C. 2929.14(A)(7) beyond a reasonable doubt and that it outweighed all other evidence after considering the nature and circumstances of the offense and the history, character and background of the offender. Thereupon, Post was sentenced to death by electrocution for the aggravated murder of Helen Vantz. He was subsequently additionally sentenced to an indefinite term of ten to twenty-five years for aggravated robbery.

Because this appeal involves the death penalty, this court must perform the following tasks; (A) answer Post's assignments of error regarding the proceedings below, (B) independently weigh the aggravating circumstance in this case against any factors which mitigate against imposing the

death penalty, and (C) independently determine whether Post's sentence is disproportionate to that imposed in similar cases. State v. Rogers (1985), 17 Ohio St. 3d 174, 175.

PART A

ASSIGNMENT OF ERROR I

"The trial court erred by not suppressing a confidential communication between the appellant and a defense retained expert."

In raising this assignment of error, Post argues that the polygraph expert Holmok was an agent of his counsel, and as such, the confession made to him is within the attorney-client privilege provided for by R.C. 2317.02(A). We find it unnecessary to determine whether Post's statements to Holmok were originally privileged due to his waiver of any such privilege by divulging them to another detainee. This court long ago held that the privilege provided by R.C. 2317.02(A) assumes that the communications are confidential and that when the confidence ceases, so does the privilege. Emley v. Selepchak (1945), 76 Ohio App. 257.[1] (44 Ohio Jurisprudence 3d (1983) 193, Evidence and Witnesses, Section 833; Agnew v. State (1982), 51 Md. App. 614, 446 A. 2d 425.) We reaffirm that holding at this time, and find that by telling his fellow inmate about the substance of the confession to Holmok, Post extinguished any privilege he might have had.

1. While Emley v. Selepchak was decided under the predecessor statute G.C. 11494, G.C. 11494 is identical in substance to the present R.C. 2317.02(A) for the purposes of the issue at hand.

ASSIGNMENT OF ERROR II

"The trial court erred in not complying with Ohio Revised Code Section 2929.03(F) which mandates that the panel of three judges state the reasons why the aggravating circumstances outweighed the mitigating factors when the sentence of death is imposed."

Post claims that the trial court did not fully comply with R.C. 2929.03(F) which provides in part:

> "The***panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. ***."

In the opinion it rendered pursuant to R.C. 2929.03(F), the trial panel considered each of the factors Post presented to mitigate against the imposition of the death penalty and expressly found that Post had failed to meet his burden to prove the existence of any of them by a preponderance of the evidence. See State v. Jenkins (1984), 15 Ohio St. 3d 164, 173. The court did, however, find that the prosecution had proven one aggravating circumstance beyond a reasonable doubt. The aggravating circumstance was that Post was the principal offender and that the murder was committed while he was committing an aggravated robbery. See R.C. 2929.04(A)(7).

While the last part of the quoted portion of R.C. 2929.03(F) does require a statement of why the aggravating circumstances outweigh the mitigating factors, in doing so, it

obviously assumes the existence of some mitigating factors. Where no mitigating factors are found, any aggravating circumstance necessarily weighs more. The purpose for requiring a statement as to why any aggravating circumstances outweigh the mitigating factors is to make clear to reviewing courts the weight and consideration given to these factors. This purpose ceases to exist when no mitigating factors are proven. We therefore hold that when a defendant has been found guilty of at least one of the aggravating circumstances of R.C. 2929.04(A), and no mitigating factors are found, the reason the aggravating circumstances outweigh the non-existent mitigating factors is obvious.

In so holding, we are mindful of our Supreme Court's admonitions concerning the trial court's duty under R.C. 2929.03(F) set forth at pages 246 and 247 of State v. Maurer (1984), 15 Ohio St. 3d 239. However, that case is distinguishable in that the trial court found a singular mitigating factor enunciated under R.C. 2929.04(B)(5).

Furthermore, we do not believe the trial court's duty under the statute requires it to set forth why certain evidence does not rise to the level of being a mitigating factor. Likewise, as stated in our response to the fourth assignment of error, we do not believe the statute requires the trial court to explain why an aggravated circumstance once proven beyond a reasonable doubt is sufficient to outweigh a total absence of mitigating factors.

Nevertheless, assuming arguendo, that such duties do devolve upon the trial court, then it could be found not to have complied with R.C. 2929.03(F). In Part B, infra, we have thoroughly articulated our evaluations of the evidence and record, together with our reasoning and findings pursuant to R.C. 2929.05. Therefore, in view of all the circumstances herein, including our independent review in Part B, infra, we do not believe the appellant was prejudiced by the failure of the trial court to enunciate its reasoning.

ASSIGNMENT OF ERROR III

> "The trial court erred in not complying with Ohio Revised Code Section 2929.03(F) which mandates that the court state in its opinion the court's findings as to the existence of any of the mitigating factors denominated in Ohio Revised Code Section 2929.05(B)."

In this assignment of error, Post claims that the trial court failed to;

> "***state***its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04***[or] any other mitigating factors, ***." (Emphasis added)

as required by R.C. 2929.03(F). This statute does not require that the trial court make specific findings as to the existence or non-existence of all of the statutory or other mitigating factors. It requires only that the trial court make specific findings as to the mitigating factors that it finds do exist. In Post's case, the trial court found that he failed to prove by a preponderance of the evidence that

any mitigating factors exist. Therefore, the trial court's failure to make specific findings as to the non-existence of Post's alleged mitigating factors under the statute or otherwise, was not error.

To interpret R.C. 2929.03(F) in such a way as to mandate that the trial court make specific findings as to the non-existence of mitigating factors is inconsistent with the purpose underlying the statute. The purpose of R.C. 2929.03(F), as discussed above, is to allow a reviewing court to understand what weight and importance the trial court gave to these factors in order to facilitate review of the balancing process. State v. Maurer (1984), 15 Ohio St. 3d 239, 246-257. Making specific findings as to non-existence would only provide a reviewing court with details regarding factors which were not considered in the balance. There is thus no need for a trial court to make specific findings as to non-existent mitigating factors.

ASSIGNMENT OF ERROR IV

> "The trial court erred by not requiring the prosecution to prove beyond a reasonable doubt that the aggravated circumstance the defendant was found guilty of committing was sufficient to outweigh the factors in mitigation of the imposition of the sentence of death."

Post claims that the following excerpt from the trial court's opinion shows that it applied the wrong burden of proof and did not require the prosecution to prove beyond a reasonable doubt that the aggravating circumstance outweighed the mitigating factors;

> "***the panel found unanimously that the state has proved the aggravated circumstances beyond a reasonable doubt, and the defendant did not prove the mitigating factors by a preponderance of the evidence, and the sentence of death should be imposed."
>
> "***."

Before a defendant can be sentenced to death, the prosecution must prove its case beyond a reasonable doubt at two levels; it must first prove the existence of at least one aggravating circumstance, R.C. 2929.04(A), and then it must prove that the aggravating circumstances are sufficient to outweigh the mitigating factors proven by the defendant, R.C. 2929.03(D)(1). The trial court here expressly found that the state had met its burden at the first level. The trial court then, having found that Post had established no mitigating factors, found that the death penalty should be applied. In doing so, the trial court did not fail to require that the state prove its case at the second level, but instead found the obvious sub silencio that a proven aggravating circumstance necessarily outweighs a lack of mitigating factors beyond a reasonable doubt.

ASSIGNMENT OF ERROR V

> "The court erred to the prejudice of the appellant by failing to consider as mitigating factors the appellant's age, his lack of prior felony convictions, his relationship with his wife, children, mother and step-mother and his plea of no contest."

Ronald Post was born on August 1, 1959, and was twenty-four years, four months and two weeks old when he murdered Helen Vantz. R.C. 2929.04(B)(4) provides that if the

defendant is a youthful offender, that fact should be considered as mitigating against imposition of the death penalty. The trial court found that Post was not a youthful offender when he shot Helen Vantz. In light of the fact that Post was more than six years above the age of majority and had lived his own life separate from his parents for several years, and the background testimony offered by his witnesses, we cannot find that the trial court erred in holding that Post was not a youthful offender. (See our discussion under Part B).

Turning to Post's argument regarding the lack of prior felony convictions, we note that R.C. 2929.04(B)(5) does not limit the court's consideration of a defendant's criminal history to his felony convictions. In determining whether a defendant's prior criminal record constitutes a mitigating factor against imposition of the death penalty, R.C. 2929.04(B)(5) requires that a trial court consider "the lack of a significant history of prior criminal convictions and delinquency adjudications". This should include misdemeanors as well as felonies. The trial court found that Post's prior misdemeanor convictions reflected a tendency toward violence and therefore did not find a lack of significant criminal history so as to constitute a factor in mitigation. In doing so, the trial court properly considered Post's criminal history as a whole rather than sever it into separate classes of crime. Given the nature of Post's misdemeanor convictions,

the trial court correctly found that no mitigating factor was established pursuant to R.C. 2929.04(B)(5).

Likewise, we find no error in the trial court's failure to find Post's familial relationships a mitigating factor. Post's alleged common-law wife admitted that his temper flared up from time to time and that on occasion, he had hit her and knocked her down. Further, the record discloses that Post's common-law wife alternatively uses the last names Post and Harsh, thus bringing into doubt the existence of a true family relationship. Post's relationship with his stepmother also is of little significance because they had no contact from 1981 until Post's incarceration. The testimony at the hearing provided no detail as to Post's relationship with his mother except that they love one another.

These three women testified almost identically to the effect that Post was a kind, considerate person who loved people and who only did wrong when led into it by others. The circumstances surrounding Post's crime however belie these contentions. The cold, heartless nature of Post's act was clearly not that of a kind, considerate, loving person. Further, Post proceeded with these crimes on his own initiative after his friends had decided against committing them, thus showing an ability and willingness to plot and execute his own criminal acts. The facts of the crime and other evidence in the case contradict the testimony of these three women as to Post's character and their relationship

with him. The trial court's finding that Post had failed to establish any mitigating factors in terms of his familial relationship is supported by the record.

In considering the effect of Post's no contest plea, the trial court found that it did not constitute "an admission by the offender" and therefore was not a mitigating factor. A no contest plea is not an admission of guilt, but is an admission of the truth of the facts alleged in the indictment. Upon acceptance of such a plea, Crim. R. 11 requires a three-judge panel to determine whether the offense was aggravated murder or a lesser offense. The plea of no contest was admittedly made to preserve an appeal of certain pre-trial rulings by the trial court and perhaps win a new trial. His plea of no contest entered more than eleven months after the murder cannot act as an acknowledgement or acceptance of his responsibility for the death of Helen Vantz and shows no measure of guilt, remorse or apology. The record supports the trial panel's decision that Post's no contest plea should not be considered as a mitigating factor.

ASSIGNMENT OF ERROR VI

> "The panel of three judges erred in imposing the death sentence, which under the facts of the case, is inappropriate, excessive and disproportionate to the penalty imposed in similar cases."

The trial court correctly found that the imposition of the death penalty was appropriate in this case and not disproportionate or excessive to the penalty imposed in similar

cases. We will deal with this issue more fully in Part C of this opinion.

ASSIGNMENT OF ERROR VII

"The trial court erred in finding that the aggravating circumstances outweighed beyond a reasonable doubt and mitigating factors adduced at the sentencing hearing."

The state need prove only one aggravating circumstance to subject Post to the possibility of a death sentence. State v. Jenkins (1984), 15 Ohio St. 3d 164, 208. The state proved the aggravating circumstance that the murder was committed while Post was committing an aggravated robbery and was the principal offender pursuant to R.C. 2929.04(A)(7). As such, given that Post established no mitigating factors, the aggravating circumstance necessarily outweighs the non-existent mitigating factors beyond a reasonable doubt. (See our discussion under Assignment of Error IV.)

PART B

We now turn to our task of independently determining whether the aggravating circumstance Post was found guilty of committing outweighs any mitigating factors as mandated by R.C. 2929.05(A). Post did not contest or deny the facts presented by the state which established beyond a reasonable doubt that he committed the murder while committing an aggravated robbery and that he was the principal offender. We therefore find the state successfully proved beyond a reasonable doubt that Post was guilty of an aggravating circumstance pursuant to R.C. 2929.04(A)(7).

We also find the record contains no indication that Helen Vantz in any way induced the killing, R.C. 2929.04(B)(1), or that Post was coerced, provoked, or under duress to commit the murder, R.C. 2929.04(B)(2). Likewise, we find no indication that Post was suffering from a mental disorder, R.C. 2929.04(B)(3), or was anything other than the principal offender, R.C. 2929.04(B)(6). That leaves us with Post's age and prior criminal history as possible statutory mitigating factors pursuant to R.C. 2929.04(B)(4) and (5) respectively.

As pointed out earlier, Post was over twenty-four years old when the murder was committed. The "youth" referred to in R.C. 2929.04(B)(4) cannot be intended to apply only to cases where the offender is less than eighteen years old because such offenders are always spared from the death penalty by R.C. 2929.03(D)(1). "Youth" must therefore apply also to offenders who are just beyond the age of eighteen, but still have some child-like tendencies and attributes. We cannot say that there is an age certain for all cases at which "youth" no longer applies, but believe that the "youth" of an offender must be determined on an ad hoc basis from the facts of each case. It depends upon the maturity, community standing, achievements, education, and experience of the offender. We do not feel that, at the age of twenty-four, Post was still a "youth" within the meaning of R.C. 2929.04(B)(4). The record indicates that

Post was a high school graduate and a mature, grown man whose acts cannot be discounted because of his age or inexperience.

After looking through the record of all of Post's past criminal activities, we do not find them to be insignificant. During the six years prior to murdering Helen Vantz, Post had been convicted of six separate crimes, four of which indicate violent and dangerous tendencies. While none of Post's prior convictions alone might constitute a significant criminal history, in combination they show distinct criminal tendencies and a propensity towards violence. Given these six misdemeanor convictions in six years, we find Post's criminal history to be significant and find no mitigating factor in this regard pursuant to R.C. 2929.04(B)(5).

Having found none of the specific statutory mitigating factors to be applicable, we now turn to R.C. 2929.04(B)(7) to see if anything else in the nature of the offense or in Post's history, character or background provide a mitigating factor. Because the burden of proving mitigating factors by a preponderance of the evidence is on Post, State v. Jenkins (1984), 15 Ohio St. 3d 164, 171, we will deal only with matters he has raised and we incorporate herein the relevant portions of our discussion under Assignment of Error V.

Post's witnesses at the sentencing hearing, his mother, stepmother, and wife/girlfriend testified mainly about Post's character and background. As pointed out in our discussion

of Assignment of Error V, their testimony as to Post's gentle and loving character was totally inconsistent with the manner in which the crime was committed. Their testimony is further contradicted by Post's criminal record which shows a tendency toward violent crime. Their claim that Post is a mere follower is defeated by his ready creation and assumption of the leading and solo role in this crime. We therefore find that Post's character does not constitute a factor in mitigation to be weighed against the death penalty.

Likewise, we find nothing in Post's background that would in any way mitigate against the death penalty. Admittedly, Post has not lived a life of luxury and stability. As a young father with a family, he had socio-economic problems as do many of his generation. Likewise, the death of a parent, the illnesses of children and the lack of steady employment are all stresses of many people. None of these individually or collectively is that extraordinary or of such magnitude as to be a mitigating factor under R.C. 2929.04(B)(7). See State v. Maurer (1984), 15 Ohio St. 3d 239, 245. The record indicates nothing in Post's background which in any way tends to excuse or rationalize this act or make it in any way more understandable.

We also find that Post's plea of no contest cannot be considered a mitigating factor for the reasons given in our discussion of Assignment of Error V.

Therefore, pursuant to R.C. 2929.05, we certify that we have reviewed all of the facts and other evidence and

determine that the trial panel's finding the defendant guilty of one aggravated circumstance is supported by the evidence and we further determine that the sentencing trial panel properly weighed that aggravating circumstance against the evidence offered as mitigating factors.

We further certify that we have made a review and after independently weighing all of the facts and other evidence disclosed in the record in the case, and having considered the offense and the offender determine that the aggravating circumstance he was found guilty of, outweighs the mitigating factors in this case beyond a reasonable doubt.

PART C

When determining whether the punishment prescribed in this case is excessive or disproportionate to that imposed in similar cases pursuant to R.C. 2929.05, it is proper for this court to limit the scope of its comparison to other cases arising from within our geographical jurisdiction. State v. Rogers (1985), 17 Ohio St. 3d 174, 186. However, this is the first case we have reviewed under our death penalty statutes and we have no prior decisions for comparison. Nevertheless, we have reviewed the sentencing opinions filed with the clerks of the Courts of Appeals of this district pursuant to R.C. 2929.03(F) and we conclude that the penalty herein was not excessive and disproportionate to that imposed in similar situations.

SUMMARY

We overrule all of appellant's assignments of error. We are persuaded beyond a reasonable doubt from the record that the aggravating circumstance of which Ronald Post was found guilty of committing outweighs the mitigating factors present in the case and that the death sentence is the appropriate sentence in this case. Thus, in accordance with R.C. 2929.04(A), we affirm the conviction and sentence of death.

We order the clerk of this court to forthwith make a true copy of this opinion, certify to its correctness and file it with the clerk of the Ohio Supreme Court.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the County of Lorain Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

JOYCE J. GEORGE
Presiding Judge

EDWARD J. MAHONEY
Judge

DANIEL B. QUILLIN
Judge

GEORGE, P. J.
QUILLIN, J.
CONCUR

APPEARANCES:

GREGORY A. WHITE, Prosecuting Attorney, 226 Middle Ave., Elyria, OH 44035 for Plaintiff.
DANIEL J. WIGHTMAN, Attorney at Law, The Smith Bldg., 110 Moore Rd., Avon Lake, OH 44012 for Defendant.
MICHAEL J. DUFF, Attorney at Law, 446 Broadway, Lorain, OH 44052 for Defendant.

STATE OF OHIO
SS
LORAIN COUNTY

Case No. 29194

CC84-79

It is therefore considered and adjudged by the Court that the defendant, Ronald Ray Post, be taken hence to the jail of Lorain County and that within the next five (5) days the Sheriff of Lorain County shall convey the said Ronald Ray Post to the Southern Ohio Correctional Facility at Lucasville, Ohio, and deliver him to the warden of said penitentiary, and that on the 16th day of August, 1985, the said warden, within the walls of the Southern Ohio Correctional Facility at Lucasville, Ohio, and within an enclosure prepared for that purpose, cause a current of electricity of sufficient intensity to cause death, to pass through the body of said Ronald Ray Post, and the application of such current continued until the said Ronald Ray Post is dead; and that the said Ronald Ray Post pay the costs of this prosecution, and execution is awarded.

Adrian F. Betleski, Judge

Joseph E. Cirigliano, Judge

Floyd D. Harris, Judge

IN THE COURT OF COMMON PLEAS, LORAIN COUNTY, OHIO
GENERAL DIVISION

STATE OF OHIO,

Plaintiff,

vs.

RONALD RAY POST,

Defendant.

Case No. 29194

OPINION

CC84-79

This Opinion is rendered pursuant to O.R.C. 2929.03(F). The Lorain County Grand Jury on April 17, 1984, returned an indictment charging the defendant, Ronald Ray Post, with Aggravated Robbery in Count 1, with a specification that defendant had in his possession a firearm while committing such felony; with

Aggravated Murder in Count 2, alleging prior calculation and design and Specification One that he was the principal offender of the Robbery while committing the murder of Helen G. Vantz, and Specification Two that defendant had in his possession a firearm while committing such felonies; and

Aggravated Robbery of Helen G. Vantz in Count 3, with Specification One that he committed Aggravated Murder, and Specification Two that defendant had in his possession a firearm while committing the felonies.

Thereafter, hearings were conducted and the trial judge ruled on numerous Motions and honored Requests for Continuation of trial date by both counsel.

On November 30, 1984, jury trial being scheduled to commence December 3, 1984, the trial judge was advised that defense counsel in completed plea negotiations with the prosecuting attorney wished to proffer a plea of "no contest" to a panel of three judges pursuant to R.C. 2929.022(A).

Thereupon, this court designated Common Pleas Judges Joseph E. Cirigliano and Floyd D. Harris to serve with him as a panel to hear the petition to withdraw the plea of not guilty and enter a plea of no contest, advise the offender of his rights pursuant to Criminal Rule 11(C), receive the written narrative of statement of facts, consider presentations of counsel and consider guilt or innocence of the charges.

After such procedures and presentations, under judgment entry dated November 30, 1984, the defendant was found guilty of all counts and each and every specification thereto as set out in the indictment in this case and defendant was referred for a pre-sentence report by the Lorain County Adult Probation Department and report

of mental examination by the Nord Mental Health Center, pursuant to R.C. 2929.03(D)(1). The panel and all counsel received copies of the report when it was presented.

By entry dated March 6, 1985, the court confirmed the February 20, 1985 notification to all judges and counsel that sentence hearing and imposition of sentence was to be conducted on March 12, 1985.

On March 12, 1985, the three judge panel convened to consider the statements of fact, relevant evidence presented at the plea of "no contest", the testimony pertinent to this sentence hearing, other evidence, statement of the offender, arguments of counsel, and reports submitted to the court pursuant to Section 2929.03(D)(1) O.R.C. and then to retire and consider in imposition of sentence, one or more of the aggravating circumstances as listed in division (A) of Section 2929.04 O.R.C., and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character and background of the offender, and any one of seven (7) factors listed in Section 2929.04(B) O.R.C. in mitigation of the sentence of death.

In presentation of the aggravating circumstances, the state elected to withdraw from consideration for sentence by the court, Count One and the specification thereto of the indictment, comprising an offense of Aggravated Robbery, while possessed of a firearm.

Defendant made no objection.

In further presentation of the aggravating circumstances to be considered by the panel, the state submitted that the finding of guilty on Count Two and the specification of the indictment proved beyond a reasonable doubt that the death of Helen Vantz was caused by prior calculation and design while the offender was committing, attempting to commit, or fleeing immediately after committing, or attempting to commit aggravated robbery as a principal offender, while possessed of a firearm on his person.

The defense objected to the panel's consideration of the element of "prior calculation and design" of this aggravating circumstance, as such element could only be considered as an aggravating circumstance for an accomplice who was not a principal offender. The objection was sustained by the panel.

The State further presented for consideration and imposition of sentence the conviction on Count Three of the indictment, the aggravated robbery of Helen G. Vantz with the specification of possession of a firearm.

Counsel stipulated to the panel the age of the defendant; that he had no previous felony or juvenile record; and that no previous offenses charged as aggrava

murder in Lorain County received the death penalty under the new statute.

In presentation of the evidence of factors listed in division (B) of Section 2929.04 O.R.C. and of any other factors in mitigation of the imposition of the sentence of death, the defendant offered the testimony of four (4) witnesses, Exhibit 1, the status report of capital indictments in the State of Ohio, and the unsworn statement of the accused.

The panel then heard the statement of William Vantz on behalf of the victim and victim's family.

Counsel argued the merits of their respective positions and the matter was submitted to the panel of judges for decision and imposition of sentence.

In their deliberations, the panel concluded that in this offense the State proved beyond a reasonable doubt only one factor of aggravating circumstances pursuant to 2929.04(A)(7) O.R.C., that:

1. Ronald Post was the principal offender, and that the offense of murder was committed while the offender was committing aggravated robbery while possessed of a firearm.

The panel concluded that the element of prior calculation and design was inapplicable and, therefore, not considered for any purpose.

In their deliberations, pursuant to O.R.C. 2929.04(B) the panel considered and weighed against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character and background of the offender, and particularly the factors stressed by defense counsel, viz:

O.R.C. 2929.04(B)(4) The youth of the offender.

The panel considered the age of the defendant and found that he was not a youthful offender.

O.R.C. 2929.04(B)(5) The offender's lack of significant history of prior criminal convictions and delinquency adjudications.

The panel found no delinquency adjudications. The panel found the misdemeanor convictions reflected a tendency to violence.

O.R.C. 2929.04(B)(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

The panel considered under this factor of mitigation:

1. The "no contest" plea. The panel found this failed as an admission by the offender.

2. The argument that this sentence should be proportionate to sentences of

other capital crimes in Lorain County and the State of Ohio. The panel found such inapplicable as a mitigating factor under the case law of Pully v. Harris, 79 L. Ed. 2d 29; State v. Jenkins, 15 O.S. 3d 164, at page 208.

3. Statement of the offender.

The panel considered this factor in mitigation of possible sentence.

4. The unindicted supplier of the weapon.

The panel considered this statement of counsel in argument, but found no evidence to support the statement.

Based upon all of the foregoing, the panel found unanimously that the state has proved the aggravated circumstances beyond a reasonable doubt, and the defendant did not prove the mitigating factors by a preponderance of the evidence, and the sentence of death should be imposed.

The panel considered the imposition of sentence on Count 3 of the indictment, the Aggravated Robbery charge, and concluded that the gravamen of the offense separate and apart from the Murder warranted a sentence of 10 to 25 years incarceration.

The panel considered the specification of possession of the firearm during commission of the Murder and Robbery and concluded that the offender receive a sentence on this specification of three (3) years actual incarceration.

The panel reconvened as a Court and advised counsel and the offender of the decision.

The defendant was asked if he had anything to say before sentence was passed. He answered, "No."

Accordingly, the court sentenced the defendant, Ronald Ray Post, to death. This pronouncement was made March 13, 1985.

On March 14, 1985, the oversight of imposition of sentence on the Aggravated Robbery and possession of a Firearm was brought to the Court's attention and by entry, the Court ordered return of the offender for imposition of sentence on those offenses.

Defendant was then brought before the Court and a sentence of 10 to 25 years penal servitude was imposed on defendant on the offense of Armed Robbery, to be served consecutively to any other sentence, and a sentence of three (3) years actual incarceration pursuant to R.C. 2929.71 was imposed, to be served consecutively to the indeterminate sentence on the Armed Robbery. This pronouncement was made March 20, 1985. Defendant remanded to the sheriff for execution of sentence.

Adrian F. Petlecki, Presiding Judge

Joseph E. Cirigliano, Judge

Floyd D. Harris, Judge

The Supreme Court of Ohio

Columbus

1987 TERM

To wit: October 28, 1987

State of Ohio, Appellee,	:	Case No. 86-425
v.	:	REHEARING ENTRY
Ronald Ray Post, Appellant.	:	(Lorain County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 28th day of October, 1987.

MARCIA J. MENGEL CLERK

DEPUTY

mother-in-law of Ralph Hall, a Ms. Stang (also the mother of Jeff Hoffner) who indicated that she went to the Colonial Motel, Center Ridge Road, North Ridgeville, Ohio to visit her daughter Debbie at approximately 9:00 p.m., when Hoffner and Post dropped Ralph Hall off, after having been out for the evening. Motel records also confirmed Hall and his wife having been registered at the motel.

During an interview with the defendant on 4-13-84, it was found that he had gone to 111 Railroad Street, and had been shooting a handgun, the same one that Ralph Hall had let him use, which later was used to kill Mrs. Vantz. The defendant stated that he had used this gun for target practice, and that two spent rounds should be found in the door of the garage. These rounds were removed, and tagged as evidence. This target practice was done a couple of months previous to the Vantz murder. Officers confirmed with the North Ridgeville Police Department that on 12-14-83 Ronald Post was stopped by one of their cruisers. The time was not able to be recalled by the patrolman. He indicated that there were two males with Post, but he did not know who they had been. He indicated that he issued a verbal warning to Post, but no citation was written.

VICTIM'S STATEMENT & IMPACT:

On 12-18-84 this officer, accompanied by Supervisor Michael E. Willets, interviewed William and Sheri Vantz, at their place of residence, 2496 Homewood Drive, Lorain, Ohio (277-0412) (Mrs. Vantz's work number, 324-2900). Mr. Vantz stated that initially his emotions had been mixed regarding the death penalty for the defendant, but over time he became convinced that the defendant should receive the death penalty. They indicated that Helen Vantz was never given an opportunity for her life, and that they know that she would have just given the defendant the money during the robbery. The defendant did not, they emphasized, need to have shot and killed Helen Vantz. The Vantz's also indicated that Helen Vantz was executed for $100.00; and emphasized the biblical 'eye for an eye". They stated that Helen Vantz had no appeal rights for her life. Both Mr. and Mrs. Vantz indicated that they do not want the defendant on the street, ever again. They stated that they do not want this type of thing to ever happen to anyone again; as well as the fact that they do not want their tax dollars put towards the maintenance of the defendant in prison for the rest of his life. Mr. Vantz indicated to this officer that he had been unemployed due to a lay-off for an extended period of time, and had as well met the challenge of financial hardship that being unemployed had brought, but that never during that period of time in his life had he considered robbing someone, or hurting someone for money. The defendant, however, had done just this thing to his mother. Mr. Vantz indicated that Helen Vantz had been employed at the Slumber Inn for 13 years, and was looking forward to the first Christmas eve off in all that time that Christmas of 1983. Mr. Vantz stated that she did not enjoy her job, yet felt too much time had been committed to it and that she was, at 52 years, too old to have sought different employment. She recognized the intrusion that her employment made in her life, and was especially anticipating Christmas due to her having that day off. She was planning to spend that Christmas eve with her son, daughter-in-law, and grandson in Mentor, Ohio, Mr. Vantz indicated, however, that his mother did not have this opportunity or occasion with her family. Christmas will always bring back this painful memory and knowledge.

Mr. Vantz stated that in terms of his own personal monetary expenses and costs as a result of the instant offense, he paid the personal expenses and settled the estate of Helen Vantz, which amounted to approximately $4,000.00 over the past year. He indicated that her will had been out of date, and her estate therefore needed to be divided through Probate Court. The Vantz's also indicated that they feel that everyone in the criminal justice system (i.e. police, prosecutor's office) they have had dealings with, have been very supportive, and professional in their approach and work. They expressed appreciation for the way they had been given unlimited amounts of support. They indicated, however, that of all the times that were the most difficult, outside of the day they were told of Helen's death, the time most distressing was during the Statement of Facts in Court in November of 1984. They indicated the information was all there, in Court, and they had to listen to it. The Vantz's indicated that they realized the tragedy that this has left behind, not just for them, but for the defendant's family as well. They indicate that the defendant's family were victims too.

The Vantz's, in conclusion, indicated that Helen Vantz had three (3) children, and that they would have them all write down, and send to this office as well as the judges in this case, a statement regarding the impact that this has had on all of their lives. The Vantz's submitted to this officer, on 12-18-84, a letter written by Michael Vantz, the victim's other son in Mentor, Ohio, the day that the defendant was found guilty of the instant offense. The following statement was received: "The only surviving and actively involved grandparent our son has had is now deceased - gone. In these formative years, when he needs a happy grandmother to love him unconditionally, without asking that teeth be brushed, or hair flawlessly groomed.

"Michael, now 10, was the one who at age 5 discovered that his grandfather had died of a heart attack. He was close to both his grandparents.

"My son, my wife, and I awaited the first Christmas Eve that mother, mother-in-law, and grandmother Helen Grace Vantz would not have to work that nightshift (that night) in 13 years. She was to spend it with us in Mentor, homey and relaxed, away from it all. The scars of her loss will always be a reminder prior to the holidays and carried through the holidays, casting its dark cloud. She did not see a family Christmas eve/morning without the intrusion of employment for a thirteen year period. She never made it to year 14."

A follow-up statement was also submitted by Mr. Michael Vance on 12-21-84, received 2-27-84 at this reporting office, in which Mr. Vance reiterated his previous statement in an effort, he stated, to convey to the Court some concept of the impact that the loss of his mother, Helen Vantz, has had on himself and his family, especially in light of the defendant's upcoming sentencing. Other statements received by the family will be forwarded to the Court as received.

DEFENDANT'S STATEMENT:

The defendant, when first interviewed, prior to conviction, and in the presence of his attorneys at the time, Mr. Michael Duff, and Mr. Ernest Hume, refused to make a statement regarding his involvement to this officer.

MR. VANTZ: Yes, Your Honor.

JUDGE BETLESKI: It's William, is it?

MR. VANTZ: Yes, sir.

JUDGE BETLESKI: Why don't you come into the litigation area; and if you would please, stand near Mr. Duff and you can address us then. We'd be happy to hear what you have.

MR. VANTZ: I don't know how to begin.

JUDGE CIRIGLIANO: Just start with your name and address.

MR. VANTZ: Okay. My name is William H. Vantz. My address is 2496 Homewood Drive, Lorain, Ohio.

This has been quite a burden on our family, not financially to say, but more in the sense that there are people out there who can take your life for no reason whatsoever at any time of the day or night, and that scares me to death. It scares my wife, it scares all my relatives.

You can pick up a newspaper and read about somebody else being killed but it never strikes until it strikes your home.

My mother was a caring, loving woman who would do anything for anyone. She never hurt

anyone; she would never, ever hurt anyone. She wouldn't have put up a fight. There was -- she had no defense.

In the twelve years that she worked at Slumber Inn she had never had a Christmas off, and this Christmas -- well, the Christmas of 1983, she was supposed to have gone to Mentor and stayed with my brother, his wife, and her only grandson.

That would have been the first Christmas in thirteen years; twelve, thirteen years. She never got that chance, she never got the opportunity.

She was supposed to go see her day's old cousin, her mother's -- her niece's daughter that morning, and she never got the chance.

Just she was full of life. She loved to go places and do things. She went to Austria, she went to the Bahamas. She enjoyed her life to the fullest, and for it to be taken in such a way is just inexcusable.

I cannot in my heart forgive Mr. Post; I never will. There is no way I could do that. He took from me my mother, and my mother was -- Mr. Post has had a chance to defend himself; she never got that chance.

She was executed, and I feel the only just

punishment for execution is execution. My family feels that way, my cousins, my brothers, our wives, friends of the family.

We loved that woman, as did everyone that came in touch with her. A part of my life left when she left, and that will never come back.

There are things that she'll never see that she wanted to see, like my child, if I have one.

This is hard for me because I'm not -- I don't like to publicly speak, but somebody had to tell our side of the story.

I'm going to leave it in your hands to do what's right, what's just. I'm not versed in the law, but yet in my heart I feel the only thing to do is to give Mr. Post what he deserves.

Thank you.

JUDGE BETLESKI: Thank you, Mr. Vantz. We appreciate your presentation.

The Court has discussed with counsel, and each side is going to get twenty minutes for summation and argument, with the State presenting in the first instance.

I'll keep track of the time, and we're happy to hear your arguments.

With that, Mr. Nagy, you may address the

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

RULE 11. Pleas. Rights Plea

(A) Pleas. A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or his attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas. With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court shall, except as provided in subsections (C)(3) and (4), proceed with sentencing under Rule 32.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he has the right to be represented by retained counsel, or pursuant to Rule 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.

(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.

(c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense, and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses. In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing him of the effect of the pleas of guilty, no contest, and not guilty and determining that he is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he has the right to be represented by retained counsel, or pursuant to Rule 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses. In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of Rule 44(B) and (C) apply to this subdivision.

(F) Negotiated plea in felony cases. When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea. If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity. The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

(3)

No. 87-6127

FILED

JUN 26 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

RONALD RAY POST,
Petitioner,
vs.
STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI

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OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On December 14, 1983, the Petitioner Ronald Post and two other individuals named Ralph Hall and Jeff Hoffner took possession of a .22 caliber handgun, and proceeded to drive through the City of North Ridgeville, Ohio for the purpose of finding a business establishment to rob.

After being foiled in an attempt to rob a local grocery store, the three discussed robbing a local motel known as the Slumber Inn. The three then decided to go to the Slumber Inn for the purpose of robbing the same.

Upon arrival, the Petitioner parked his motor vehicle and entered the Slumber Inn while Mr. Hall and Mr. Hoffner remained in his vehicle. While inside the Slumber Inn, the Petitioner met with the afternoon shift desk clerk whom he knew from prior years. At this time he informed the clerk that he was there for the purpose of checking out room rates, and that he might need a place to stay. The Petitioner subsequently left the Slumber Inn, and he and his two accomplices decided that they would not complete the robbery.

The Petitioner then proceeded to drop off Mr. Hall and Mr. Hoffner at their respective residences, but the Petitioner kept possession of the .22 caliber handgun. Subsequent thereto Petitioner drove his motor vehicle back to the Slumber Inn Motel and engaged the afternoon shift desk clerk in another conversation. At approximately 12:15 a.m. on December 15, 1983, Mrs. Helen Vantz, the victim, arrived for her shift as the midnight desk clerk at the Slumber Inn. At this time the Petitioner was introduced to Mrs. Vantz by the afternoon shift desk clerk as someone she had known in the past. The Petitioner and the two clerks engaged in a conversation during which Mrs. Helen Vantz was told by the afternoon shift desk clerk that Mr. Post might later return for a room. Subsequent thereto, Mr. Post and the afternoon desk clerk proceeded to another local hotel. Approximately two and one-half hours later the Petitioner returned by himself to the Slumber Inn, armed with the handgun previously mentioned. His plan was to kill Mrs. Vantz and to remove what valuables he could

find from the Inn. The victim, Helen Vantz, having previously been advised that the Petitioner might return for the purposes of obtaining lodging, allowed him to enter the lobby area. The Petitioner remained there, engaging Mrs. Vantz in conversation past the hour of 4 a.m., when a wake-up call was made by the victim to the occupants of one of the motel rooms.

The next wake-up call scheduled to be made at 6 a.m. was never made.

Sometime between the hours of 4 a.m. and 6 a.m. on December 15, 1983, the Petitioner carried out his plan to rob the Slumber Inn and murder Helen Vantz. As Mrs. Vantz was sitting at her desk preparing her nightly accounts, the Petitioner positioned himself just behind her right shoulder. From a distance of approximately six feet, the Petitioner murdered Mrs. Vantz by firing his handgun twice into her head. As a result of the two projectiles which entered the rear portion of Mrs. Vantz's skull, Mrs. Vantz died.

After killing Mrs. Vantz, the Petitioner removed certain items of value from the premises, including a bank deposit bag containing approximately $100.00, and a handbag containing various items belonging to the victim.

At approximately 7 a.m., the victim's body was discovered by an occupant of the motel who was in the process of checking out. The body was slumped in the desk chair, where she was working when she was killed, and her pencil was still clasped in her hand.

Meanwhile, the Petitioner had returned to the City of North Ridgeville and advised Ralph and Debbie Hall of what he had done. The Petitioner then asked Mr. Hall to dispose of the murder weapon.

He then proceeded to the house of Mr. James Harsh, for the purpose of establishing an alibi. He obtained a commitment from Mr. Harsh to state that he arrived at the Harsh residence at approximately 2:30 a.m. and stayed there until 7:30 a.m., December 15, 1983. He also confessed to Mr. Harsh that he had killed Helen Vantz and robbed the Slumber Inn.

The Petitioner subsequently made several other incriminating statements outlining his sole involvement in these crimes to approximately four other individuals.

The Petitioner also admitted to Detectives Medders and Jaykel of the Elyria City Police Department that he had previously admitted to a Mr. David Thacker that he was the perpetrator of these crimes.

The Petitioner was subsequently indicted on one count of aggravated robbery with a firearm specification; one count of aggravated murder with the specification that he was the principal offender during the commission of an aggravated robbery when he committed a murder with a firearm; and in the alternative he was indicted for aggravated murder with the specification alleging that the murder occurred during the course of an aggravated robbery, and that the Petitioner possessed a firearm during the course of the offense.

On or about November 30, 1984, the Petitioner withdrew his formal pleas of not guilty to all counts in the indictment and entered a plea of no contest to the indictment. At this time the Petitioner's counsel indicated that with one exception, it was agreed as part of the plea bargain that Petitioner's counsel would not contest or deny the statement of facts the prosecutor was about to read into the record. The prosecutor then read into the record a set of facts almost identical to those previously described herein.

Upon consideration of the Petitioner's plea of no contest, the trial court found the Petitioner guilty on all counts and each and every specification as set out in the indictment.

On or about March 12, 1985, a three-judge panel was convened in order to hear evidence of aggravating and/or mitigating circumstances to determine the type of sentence or punishment which would be rendered on this matter. At this time the State of Ohio resubmitted an uncontested statement of facts which substantiated the Petitioner's prior calculation and decision to end the life of Mrs. Helen Vantz. This statement of facts also substantiated the fact that the Petitioner intended to cause the death of Helen Vantz during the course of an aggravated robbery.

During the course of the hearing on March 12, 1985, the Petitioner proffered evidence which he believed supported mitigating circumstances for the sentencing panels' consideration. After the Petitioner had rested, at the request of one of Petitioner's attorneys, the sentencing panel asked whether any member of the victim's family was present, and whether any such member would wish to bring to the court's attention matters that might be pertinent on aggravation or mitigation. At this time, and without any objection from either of the petitioner's two attorneys, the son of the victim addressed the three-judge panel. See pages A23 through A25 in the Appendix to this Brief.

Subsequent to the aforementioned hearing, the sentencing panel found that the Petitioner was not a youthful offender, and that he lacked a significant history of prior criminal convictions, although he did have prior misdemeanor convictions reflecting a tendency to violence. The sentencing panel further found that the

Petitioner's plea of no contest failed as an admission of the offense and that this was not considered as a factor in mitigation. The panel further found that the Petitioner was the principal offender in the course of an aggravated robbery, and that the offense of aggravated murder was committed during this aggravated robbery while the Petitioner was possessed of a firearm. The sentencing panel unanimously found that the State of Ohio had proven the aggravating circumstances beyond a reasonable doubt, and that the Petitioner had failed to prove any mitigating factors by a preponderance of the evidence.

The Petitioner was then sentenced to death on the aggravated murder during the course of the commission of the aggravated robbery. The Petitioner was sentenced to ten to twenty-five years on the aggravated robbery and three additional years for the use of the firearm. All sentences were to be served consecutively.

The Ninth District Court of Appeals unanimously found that no error was committed in the trial court, and that no mitigating factors existed, that one aggravating circumstance existed and that the penalty was not excessive and disproportionate to that imposed in similar situations.

The Ohio Supreme Court unanimously found no error in the trial court, that no mitigating factors existed, that one aggravating circumstance existed and that the penalty was not excessive or disproportionate to that imposed in similar situations.

REASONS FOR DENYING WRIT OF CERTIORARI

I. IN A BENCH TRIAL IN A CRIMINAL CASE, IT IS PRESUMED THAT THE TRIAL COURT CONSIDERED ONLY THE RELEVANT MATERIAL, AND COMPETENT EVIDENCE IN ARRIVING AT ITS JUDGMENT, UNLESS IT AFFIRMATIVELY APPEARS TO THE CONTRARY.

In his first proposition of law, the Petitioner contends that by virtue of this Honorable Supreme Court's holding in *Booth v. Maryland*, 482 U.S. _____, 96 L. Ed. 2d 440 (1987), *re-hearing denied*, 108 S. Ct. 31 (1987), it is error to allow the introduction of a victim impact statement during the sentencing phase of a capital case before a three-judge panel.

It should be initially pointed out that contrary to Maryland law, as the facts existed in *Booth*, *supra*, Ohio law does not allow for the introduction of victim impact evidence in pre-sentence investigation reports pertaining to capital offenses. See page 383 of the Ohio Supreme Court's opinion in *State v. Post* (1987), 32 Ohio State 3d 380, which is attached to the Petitioner's brief in the appendix in pages A4 through A11.

In the matter at hand, the victim's son was allowed to make an in-court statement during the sentencing phase of the proceedings. It must be pointed out however, that this statement was received without objection from the Petitioner. See pages A23 through A25 in the Appendix to this Brief.

Additionally, it should be pointed out that no assignment of error was raised in the Court of Appeals on the admission into evidence of the victim impact statement. Generally, such evidence is excluded because

it is irrelevant and immaterial to the guilt or innocence of the accused and the penalty to be imposed. The principle reason for the prejudicial effect is that it serves to inflame the passion of a jury with evidence collateral to the principle issue at bar. Although the admission and subsequent argument with the use of this testimony may constitute prejudicial error before a jury, it is submitted that such evidence does not prejudice a defendant before a three-judge panel, unless the three-judge panel specifically points to such evidence in rendering a sentence of death.

It is respectfully submitted that the Petitioner can point to no part of the three-judge sentencing panel's written decision reflecting a reliance on the part of the panel on such evidence to justify the sentence of death.

Due to the fact that the Petitioner did not object to any of the victim impact evidence during the sentencing phase before the three-judge panel, due to the fact that the Petitioner did not assign as error in the first appellate stage the admission of such evidence, and due to the fact that the Petitioner can point to no reliance upon such evidence by the three-judge panel in rendering its sentence of death, it is respectfully submitted that the Petitioner has waived any objections to the admissibility of such evidence, and he has failed to show that any of this evidence was prejudicial. As such, it is respectfully submitted that the victim impact statement in this matter did not violate the Petitioner's rights pursuant to the Eighth and Fourteenth Amendments of the United States Constitution, or this Court's decision in *Booth v. Maryland, supra.*

II. A CLIENT'S DISCLOSURE TO A THIRD PARTY OF COMMUNICATIONS MADE PURSUANT TO THE ATTORNEY-CLIENT PRIVILEGE BREACHES THE CONFIDENTIALITY UNDERLYING THE PRIVILEGE, AND CONSTITUTES A WAIVER THEREOF. AS SUCH, REQUIRING A CRIMINAL DEFENDANT'S COUNSEL TO PRODUCE UNPRIVILEGED DOCUMENTARY EVIDENCE DOES NOT VIOLATE THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, OR THE DEFENDANT'S RIGHT AGAINST SELF-INCRIMINATION.

On November 20, 1984, the trial court conducted a hearing on the Petitioner's motion *in limine* to exclude the testimony of Detective Robert Holmok, a polygraphist. Detective Holmok had been retained by the attorneys for the Petitioner for the purpose of administering a polygraph test. Prior to administering the polygraph test, the Petitioner admitted to Detective Holmok that he had robbed the Slumber Inn on December 15, 1983 and shot and killed Helen Vantz. The Petitioner also signed a written document containing this statement. Subsequent to making this confession to his own polygraphist, the Petitioner admitted to a fellow inmate at the Lorain County Correctional Facility, Richard Slusher, that he had signed a written confession admitting his part in the murder of Helen Vantz while he was in the presence of Detective Holmok. The Petitioner also stated to Richard Slusher that the facts contained within the said written confession were true.

The State of Ohio learned of this confession from Richard Slusher and communicated to the attorneys for the Petitioner that the State would attempt to utilize

such evidence during the course of a trial. As a result of this communication, the attorneys for the Petitioners filed a motion *in limine* to exclude the testimony.

The trial court ruled that when the Petitioner disclosed to Richard Slusher the fact that he had made admissions to Robert Holmok, and signed a written confession to that effect, the Petitioner waived any and all claims of attorney-client privilege he might have had to the written confession or to the testimony from Mr. Holmok authenicating the written confession.

It should be pointed out to this Honorable Court that the State of Ohio did not utilize this piece of evidence in the facts presented to the trial court at the time that the Petitioner changed his plea from not guilty to no contest.

The Ohio Supreme Court held that a client disclosure to a third party of communications made pursuant to the attorney-client privilege breaches the confidentiality underlying the privilege and constitutes a waiver thereof.

In *Fischer v. United States* (1976), 425 U.S. 391, 96 S. Ct. 1569, this Honorable Court held that a taxpayer's fifth amendment privileges were not violated by the enforcement of a documentary summons directed towards their attorneys, for the production of documents which had been transferred to the attorneys in connection with an I.R.S. investigation. This Court held that due to a previous voluntary disclosure to I.R.S. by the Defendants, any privilege or confidentiality had been stripped, and thus defeated the attorney-client privilege. This Court held that in the absence of an attorney-client privilege, the taxpayer's attorney could not assert the taxpayer's fifth amendment privilege against self-incrimination to resist pre-trial subpoenas *duces tecum* issued on behalf of the government. In other words, this

Court held that an attorney cannot be forced to produce documents in his possession which are otherwise privileged under the attorney-client privilege. That in such a situation a production of such evidence would in fact be a violation of his client's fifth amendment rights against self-incrimination. However, where an attorney is in the possession of unprivileged evidence, he cannot assert his client's fifth amendment rights against self-incrimination so as to resist the production of such evidence.

Applied to the matter at hand, due to the fact that the written confession in issue was not privileged as a result of the Petitioner's waiver, there was no infringement upon his fifth amendment rights against self-incrimination by requiring his attorneys' experts to produce the written confession. Additionally, it must be pointed out again that this particular piece of evidence was not submitted by the state into evidence during the proceedings, and there is absolutely no requirement that the state would have utilized such evidence should it had been forced to try this matter.

The Petitioner also contends that his sixth amendment rights to assistance of counsel had been violated due to the Court's ruling that his written confession was admissible. This proposition of law must also fail for the same reasons that the Petitioner's self-incrimination rights were not violated by the admissibility of this evidence. Where confidential and privilege material is disclosed to the state or the federal government, it has been held that a criminal defendant's sixth amendment right to the effective assistance of counsel has been violated. However, where the criminal defendant has in fact waived any confidentiality or privilege to a particular piece of evidence and such

evidence thereby becomes admissible, a criminal defendant's sixth amendment right to the effective assistance of counsel is not violated by admitting such evidence. In conclusion, it is respectfully submitted that due to the fact that the Petitioner waived the confidential and privileged nature of his admission, by disclosing the substance and admitting its truth to a third party, the admissibility of such evidence is not a violation of the Petitioner's fifth amendment rights against self-incrimination, or his sixth amendment rights to the effective assistance of counsel.

III. PETITIONER'S PLEA OF NO CONTEST WAS VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY MADE AND THEREFORE VALID.

Petitioner attacks the validity of his no contest plea claiming it was not voluntarily, knowingly, and intelligently made. Petitioner argues that precedent established in *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463 (1970) renders the plea invalid. This court's ruling in *Brady v. United States, supra*, determined that a plea must be made knowingly, voluntarily, and intelligently in order to be adjudged valid.

Petitioner's plea was knowingly, voluntarily, and intelligently made. The Petitioner was informed by the trial court of all the charges against him, he was informed of the punishment for each, and was informed of his rights to a jury trial, to confront witnesses, and to assistance of counsel. Subsequently Petitioner entered his plea of no contest. Petitioner was represented by counsel thorughout the procedure. *See* pages A1-A22 in the Appendix to this Brief.

It can only be assumed that the reason the Petitioner entered a plea of no contest was one of a strategic choice made by both the Petitioner and his counsel. This is much like the choice of presenting the case to a three judge panel rather than a jury. These were strategic choices made by the Petitioner in a knowing, voluntary, and intelligent manner.

There may be certain tactical or strategic instances when a defendant's counsel would advise the defendant to plead guilty in order to rely on mitigating factors which he believed will carry great weight that may be diminished if a guilt-innocence phase is conducted. The

Petitioner in the present case may have decided this was one of those such circumstances because of the heinous nature of the offense.

Petitioner claims as evidence that the plea was not voluntarily made the fact that he received nothing in return for his plea. Petitioner made a strategic choice in entering his plea of no contest for both procedural and sentencing purposes. Now that the outcome is adverse to the Petitioner it is inherently unfair for him to claim that such strategy which was unsuccessful renders the plea invalid. The Petitioner asks this court to use hindsight in an attempt to further his cause.

In entering his plea of no contest, the Petitioner was permitted, by stipulation from the State of Ohio through the assistant prosecutor, to change his earlier Motion *in Limine* on his confession to the polygraphist Robert Holmok, to one of a motion to suppress. The Petitioner wanted this to preserve on appeal the subject matter of said motion.

This was a benefit bestowed upon the Petitioner deemed important to him at the time the plea was entered. Therefore, Petitioner's claim that he received no benefit for his plea is simply not true.

It was also Petitioner's hope that said plea would benefit him by causing the trial court to be more lenient towards him in sentencing and not impose a penalty of death.

Petitioner further argues that evidence of the invalidity of the plea is that Petitioner throughout maintained his innocence. An accused may voluntarily, knowingly, and with full understanding consent to the imposition of a sentence even though he is unwilling to admit to participation in the crime, even if his guilty plea

contains a protestation of innocence. *North Carolina v. Alford*, 400 U.S. 25 (1970), *Brady v. United States*, 397 U.S. 742 (1970). Reasons other than the fact that he is guilty may induce a defendant to so plead and he must be permitted to judge for himself in this respect.

In *Lynch v. Overholser*, 369 U.S. 705 (1962) as cited to in *North Carolina v. Alford*, 400 U.S. 25 (1970), this Court implied that there would be no constitutional error in accepting a plea even though evidence before the Court indicated there was a valid defense by which defendant could proceed with at trial.

This Court in its opinion in *Brady v. United States*, 397 U.S. 742 (1970), stated:

> "The rule that a plea must be intelligently made to be valid does not require that a plea be invulnerable to later attack if the defendant did not correctly assess every relevant factor entering his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the qualities of the State's case or the likely penalties attached to alternative causes of action." *Brady v. United States, supra* at 757.

The Petitioner and his counsel were informed by the trial court of all the charges against him, they were aware of the possible punishment for each of those charges. They were aware of their right to a jury trial, which they waived as a matter of trial strategy. They were aware of their right to confront witnesses, and make the state prove each and every element of the charge, which they waived as a matter of trial strategy. Now that the Petitioner has learned that his "calculus misapprehended" the final outcome he wishes to have the plea invalidated. The rules do not allow such

circumscription of remedies; the Petitioner may not dictate his own relief nor deprive the trial court its discretion in accepting a plea as valid.

Petitioner claims that the trial court committed prejudicial error in accepting the plea of no contest without first establishing a factual basis for the plea. However, it must be noted that Ohio Criminal Rule 11 does not require the trial court to establish such factual basis. The court must establish that the plea was made by the defendant knowingly and voluntarily with a full understanding of the effect of the plea. The trial court along with all previous reviewing courts concluded the plea was made knowingly, voluntarily, and intelligently.

Petitioner claims that language in *North Carolina v. Alford*, 400 U.S. 25 (1970) demands that such determination of a factual basis be made. This is not legal precedent but rather *dicta* in this Court's opinion. This Court has implied that there would be no constitutional error in accepting a plea even though evidence before the Court indicated there could be a valid defense with which to proceed. *North Carolina v. Alford, supra, Lynch v. Overholser*, 369 U.S. 705 (1962).

Petitioner further claims that his plea was not intelligently made because it did not involve effective assistance of counsel. This Court developed a two-prong standard by which all ineffective assistance of counsel claims should be measured against in *Strickland v. Washington*, 466 U.S. 668 (1984).

> "First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington, supra* at 687.

A review of the facts of *Strickland* will reveal that it is very similar to the case *sub judice*. The defendant entered the plea of guilty to an indictment that included three capital murder charges. In preparing for the sentencing phase of the trial, defense counsel spoke with the defendant about his background, but did not seek out character witnesses. Counsel did not request a pre-sentence report in fear that it would have included the defendant's criminal history. Counsel advised defendant to rely solely on his plea colloquy in hopes of receiving leniency for stepping forward and admitting responsibility. These were all trial tactics that counsel chose to employ. This strategy seemed to be a viable alternative to presenting numerous pieces of possible mitigating evidence that would in all probability be discredited by the prosecution.

This Court considered this with great scrutiny when rendering its decision.

> "The record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstances and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. Although counsel understandably felt hopeless about respondent's prospects . . ., nothing in the record indicates, . . ., that counsel's sense of hopelessness distorted his professional judgment: Counsel's strategy choice was well within the range of professionally reasonable judgments." *Strickland v. Washington, supra* at 2070.

This Court believed that counsel's choice of strategy was well within the "range of professionally reasonable judgments." This Court held that the defendant failed on both prongs of the standard of alleged ineffectiveness. He failed to show either deficient performance or sufficient prejudice. There was no showing that the justice of his sentence was rendered unreliable by a failure of the adversary system caused by inefficiencies of his counsel.

The case *sub judice* is readily comparable to that of the previous case discussed. Both involved strategic choices made by the defendants along with their counsel. Petitioner's continual claim that he received nothing in return for his plea is unfounded. Petitioner, in entering his plea of no contest, was permitted through stipulation from the state of Ohio, to change his earlier Motion *in Limine* to one of a motion to suppress for purposes of preserving an appeal on the subject matter of said motion. Petitioner's tactic was also entered in hopes of receiving a more lenient sentence, much like the tactic in *Strickland, supra.* The Petitioner's counsel made a strategic choice that when looked at in light of the *Strickland* decision can be seen to fall within the range of professionally reasonable judgments.

Petitioner asks this Court to use hindsight to render a decision on whether a strategic choice was a proper choice. Hindsight may not be used as it would be inherently unfair for this Court or any court to judge attorney performance and decision making on the final outcome of any case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Pages 10 through 44 of the Transcript of Proceedings on November 30, 1984

[10] Mr. Nagy: Your Honor, if I may, I believe the next course of business would be—prior to the inquiry of the Defendant—we have prepared in conjunction, working with Defense counsel on this matter, a certificate of counsel which I would ask at this time one of the attorneys for Mr. Post to read to the Court.

Judge Betleski: All right.

Ms. McGough: If it please the Court, this is a certificate of counsel in Case Number 29194.

The undersigned, as attorneys for Defendant Ronald Ray Post, hereby certify, one, that we have read and fully explained to the Defendant the allegations contained in the indictment in the within matters; two, to the best of our knowledge and belief, the statements, representations, and declarations made by the Defendant in the attached petition are in all respects accurate and true; three, we have examined the maximum penalty for each charge in the indictment to Defendant.

[11] Judge Betleski: Explained.

Ms. McGough: We have explained the maximum penalty for each charge in the indictment to the Defendant; four, that the plea of no contest offered by the Defendant accords with our understanding of the facts he related to us and is consistent with our advice to him, to the Defendant; and that we understand and have communicated to the Defendant, who also understands, that the plea of no contest is not an admission of Defendant's guilt but is an admission of the truth of the facts contained in the indictment in this case; and five, in our opinion, the plea of no contest offered by the Defendant is voluntary, is made with understanding of all his rights and consequences of his actions.

We recommend that the Court accept the plea of no contest, understanding that if the indictment alleges facts sufficient to support a conviction, then the Trial Court's acceptance of the no contest plea requires a guilty finding, assuming that the statement of facts or explanation of circumstances by the prosecuting attorney, following the entry of the plea of no contest, establishes all the elements of the offenses [12] charged in the indictment.

By voluntarily entering this plea of no contest, Defendant understands that we, as his attorneys, will not contest nor deny the truth of the allegations contained in the prosecuting attorney's explanation of circumstances or statement of facts to the Court of three Judges upon tendering said plea.

This is signed by myself and Michael Duff in open Court in the presence of the Defendant above-named, after full discussion of the contents of the certificate with the Defendant, Ronald Ray Post, this 30th day of November, 1984.

Mr. Duff: Your Honor, before it's executed, there's one addendum I'd like to make—and Mr. Nagy is aware of this—on behalf of the Defendant.

The second to last sentence of this agreement, "By voluntarily entering this plea of no contest," that sentence, Defendant understands that we will not contest nor deny the truth of any allegation contained in the statement of facts.

Your Honor, to that we'd like to add that a crucial element involved in the entering of this plea—and it's not contained in the statement [13] of facts as written up by the Prosecutor's Office—is the Court's ruling that Detective Holmok could testify as to the statements Ronald Post allegedly made to him, and we'd object to

that omission from the prosecutor's statement of facts as we feel that's a crucial piece of evidence, and that's the evidence which we intend to take up on appeal.

So that, that is made clear on the record. Is that correct, Mr. Nagy?

Mr. Nagy: Mr. Duff's statement is correct, Your Honor, in that we have had a disagreement on that particular point.

However, I would point out that it is our contention, and it will certainly be up to this Court to determine whether our statement of facts leaving out that particular item will satisfy all of the elements of the crimes charged in the indictment.

If it does so, we submit that it is sufficient for this Court to make a finding.

We further submit that just because this Court ruled that a particular piece of evidence is admissible at trial does not necessarily make it incumbent on the Prosecution to present that evidence at trial.

[14] It is a matter of trial strategy whether it would be presented and whether it should be presented as part of the State's case, a matter which we were at some odds on because obviously we hadn't gotten into the trial and we hadn't made that determination at this point.

So, with that, we would still accept the certificate of counsel, that not being a denial but merely an explanation of what they feel is an omission; we feel is simply a matter within our discretion as the triers for the State's case.

Mr. Duff: Your Honor, we feel it's a crucial omission because we feel that's a crucial piece of evidence, and we want the record to reflect that Detective Holmok's testimony is part and parcel of this plea and we intend to take that up on appeal.

So, it's clear.

Mr. Nagy: We understand that.

Judge Cirigliano: Do you intend to use that in the statement of facts to support your position on behalf of the State, Mr. Nagy?

Mr. Nagy: To use that statement to Detective Holmok?

Judge Cirigliano: Yes.

[15] Mr. Nagy: No, Your Honor, I do not.

Mr. Duff: It's conspicuously absent from the statement.

Judge Cirigliano: I understand.

Mr. Duff: And that's why we object.

Ms. McGough: With those comments on the record, we offer to the Court our certificate of counsel.

Judge Betleski: All right, thank you.

Mr. Nagy: Your Honor, at this time I would ask that the Court inquire as is usual with the proffer of a no contest plea, using our petition to withdraw and enter the plea of no contest as the basis for its inquiry.

Judge Betleski: You want to step forward, Mr. Post. It will be a little handier. We don't have to shout at a great distance.

Your tender?

Mr. Duff: Your Honor, may it please the Court, in Case Number 29194, pursuant to extensive pretrial negotiations in this case, we'd withdraw our former plea of not guilty in this case to all counts of the indictment and enter [16] a plea of no contest to all those counts.

We've gone over the petition to withdraw the plea of not guilty and enter a plea of no contest in detail with Mr. Post.

Let the record reflect that it's nine pages. Mr. Post has signed it; he tells me, Your Honor, that he understands all the questions in there.

I'd also ask the Court to note that on page eight of the original, Item Number Nineteen, that first sentence has, by agreement of the parties, been scratched from the petition.

Let the record so reflect, Your Honor, that was upon request of Mr. Post.

Your Honor, we've gone over this plea sheet in detail with him, Ms. McGough and I, and it's our desire at this time to enter the plea of no contest to all the charges.

Judge Harris: How many charges are there?

Mr. Duff: Three, Your Honor.

Ms. McGough: There are three counts.

Judge Harris: There are three counts?

[17] Ms. McGough: And the specifications.

Mr. Duff: Aggravated robbery and aggravated murder in the alternative, two different ways, Your Honor.

Judge Betleski: These initials on this, is that—

Mr. Duff: Michael James Duff after Robert A. Nagy.

Judge Betleski: Okay.

Mr. Nagy: That is correct, we have agreed to that, Your Honor.

It's my further understanding that the plea of no contest is to all charges and specifications.

Mr. Duff: That's correct. It includes the specs on the indictment.

Judge Betleski: Well, Mr. Post, I'm reading here. In this nine pages you've given me a lot of data, a lot of information.

It says your full name is Ronald Ray Post, you're twenty-five years of age. Is that correct?

The Defendant: Yes, sir.

Judge Betleski: And your birthdate: August 1, 1959. You've had twelve years of education.

The Defendant: Yes, sir.

[18] Judge Betleski: You're able to read and write and understand the English language.

The Defendant: Yes, sir.

Judge Betleski: That's important.

You're represented by two attorneys appointed by the Court, and they're Mr. Michael Duff and Attorney Lynett McGough, right?

The Defendant: Yes, sir.

Judge Betleski: Your attorneys have already explained to you the charges in this case, correct?

The Defendant: Yes, sir, they have.

Judge Betleski: First we'll go into the charges, because the nature of the offenses have to be explained to you, and under the Criminal Rules they have to be explained to you in ordinary language that you can comprehend.

Many times the terminology is a little complicated. So, for that reason, I'll just read the narration here.

Count one in the indictment charges you with an aggravated robbery of the Slumber Inn Motel and/or the desk clerk, Helen Vantz, while you had a firearm on or about your person or under your control, and this is in violation of Section 2911.01 [19] of the Ohio Revised Code. It's an aggravated felony of the first degree.

Count one also contains a specification alleging that you had a firearm on or about your person or under your control while committing this offense.

So, that has to do with count one and the spec.

On count number two you're charged with the aggravated murder of Helen G. Vantz with prior calculation and design in violation of Section 2903.01(A) of the Ohio Revised Code.

Count two also contains a specification under Section 2929.04 of the Ohio Revised Code alleging that this offense was committed while you were committing or attempting to commit aggravated robbery and that you were the principal offender in the commission of the aggravated murder of Helen G. Vantz, and that you committed the murder of Helen Vantz with prior calculation and design while you were committing or attempting to commit aggravated robbery.

The second specification to count two alleges that you had a firearm on or about your person or under your control while you committed [20] this offense.

Do you understand me so far?

The Defendant: Yes, sir.

Judge Betleski: Count three. It says that the aggravated murder of Helen Vantz was committed while you were committing or attempting to commit aggravated robbery in violation of Section 2903.01(B) of the Ohio Revised Code.

Count three also contains a specification under Section 2929.04 of the Ohio Revised Code to the effect that the offense was committed while you were committing or attempting to commit aggravated robbery, and that you were the principal offender in the commission of the aggravated murder of Helen G. Vantz, and that you committed the murder of Helen G. Vantz with prior calculation and design while you were committing or attempting to commit aggravated robbery.

The second specification to count three alleges you had a firearm on or about your person or under your control while you committed the offense.

This count alleges the same offense as count two but under a different theory of law, do you understand?

[21] The Defendant: Yes, sir, I do.

Judge Betleski: Now, you've received a copy of the charges against you and you've had an opportunity to review the same with your attorneys for a number of weeks prior to this date, is that correct?

The Defendant: Yes, sir, I have.

Judge Betleski: You've read and have had read to you all the charges, and you've discussed them with your lawyers, correct?

The Defendant: Yes, sir.

Judge Betleski: You understand each of the charges and the elements contained in them, correct?

The Defendant: Yes, sir.

Judge Betleski: You've told your lawyers all the facts and circumstances known to you about the charges made against you, and you believe that your lawyers have fully informed you on all legal matters and your rights, correct?

The Defendant: Yes, sir.

Judge Betleski: Now, you also say here you know that the Court must be satisfied that there is a factual basis for your plea of no contest before the plea can or will be [22] accepted, and you understand that a plea of no contest is not an admission of your guilt but it it an admission of the truth of the facts alleged in the indictment. You understand that?

The Defendant: Yes, sir.

Judge Betleski: The facts in the indictment were as I read previously, do you understand that?

The Defendant: Yes, sir, I understand.

Judge Betleski: You further understand, and this is obvious, that the Court is required to make an explanation of the circumstances—excuse me—to take an explanation of the circumstances from the prosecuting attorney on your plea of no contest before making a finding on said plea?

You understand, that comes subsequent. I listen to the prosecutor after I've explained your rights to you, you understand?

The Defendant: Yes, sir, I do.

Judge Betleski: And you're aware, it says here, and you agree—I'll ask you: Do you agree that the indictment alleges facts sufficient to support a conviction and the prosecuting attorney's explanation of circumstances also [23] contains such facts sufficient to support a conviction? You understand that?

The Defendant: Yes, sir.

Judge Betleski: If this is so, then the Trial Court's acceptance of a no contest plea requires a guilty finding, you understand?

The Defendant: Yes, sir.

Judge Betleski: Finally, with regard to your plea of no contest, you're aware that if it appears to the Trial Court that the explanation of circumstances as recited by the prosecuting attorney does not constitute the offenses as charged in the indictment, the Trial Court will refuse to accept the plea of no contest?

That's important. I'll repeat it.

If the narration of facts by the prosecuting attorney does not constitute the offenses as charged in the indictment, the Trial Court will refuse to accept your plea of no contest.

The Defendant: Yes, sir, I understand.

Judge Betleski: You go back to square one.

The Defendant: Yes, sir.

Judge Betleski: Your lawyers have counseled with you and advised you as to the nature [24] of the charges against you.

We're repeating ourselves.

They've told you about the elements of the charges, all the lesser included offenses, and all the possible defenses that you may have in this case.

Are you satisfied that your lawyers have done what you have requested them to do? Is that the fact; are you satisfied?

The Defendant: Yes, sir, I am.

Judge Betleski: Now, you have pleaded not guilty to the charges made against you, and if you do not withdraw your plea of not guilty—because what we have here is a proffer of a no contest plea, and it's as though it's hanging in the air here; and you can withdraw it at any time, you follow?

You pleaded not guilty and that's on the record, excuse me. Your no contest plea is hanging in the air until it's accepted by this Court, okay?

Now, if you want to, you can withdraw this no contest plea. We would stop right here. But if you do, you'd go back to your not guilty plea, you understand that?

[25] The Defendant: Yes, sir, I understand.

Judge Betleski: With a not guilty plea then you would have your right to a jury trial, you understand that?

The Defendant: Yes, sir, I do.

Judge Betleski: By tendering a plea of no contest, upon acceptance of it and upon a finding, then what has happened is that you have set aside your trial to a jury, you understand that?

The Defendant: Yes, sir, I do.

Judge Betleski: Actually, in the interim we have already put on record that you don't want a trial by jury but you want a trial by a three Judge panel.

The Defendant: I understand.

Judge Betleski: If you go back to a jury trial or if we go ahead with the procedures here, in the event of the jury trial the jury verdict must be unanimous; likewise,

the Judges' decision must be unanimous as for guilt or innocence, do you understand? It is the same requirement.

The Defendant: Yes, I do.

[26] Judge Betleski: That doesn't change. Whether it's a jury or whether it's a three Judge panel, it's got to be unanimous.

The Defendant: I understand.

Judge Betleski: In a jury trial, which you wouldn't have here—in a Judge's trial you'd have the right to confront the witnesses.

In this case there will be no witnesses; there will be just a narration of the facts.

But you understand in a jury trial you would have the right to confront witnesses. Do you understand that?

The Defendant: Yes, I do.

Judge Betleski: And you'd have the right to get witnesses on your behalf. The State would mandate any witness you wanted at a jury trial to be here, you understand that?

The Defendant: I understand.

Judge Betleski: The burden in a jury trial is on the State to prove your guilt beyond a reasonable doubt. That's a high degree of proof.

You have no burden to prove your innocence. That's the presumption of innocence that you have at a jury trial, do you understand that?

[27] The Defendant: I understand.

Judge Betleski: You do not have an obligation to testify at any trial. You have the privilege against self-incrimination.

Not only that, but a jury is instructed prior to the trial that if you choose to remain silent at a trial, your silence can't be construed as if it were an admission of any act charged in the indictment, you understand that?

The Defendant: Yes.

Judge Betleski: I've touched on the presumption of innocence that clothes you at a trial table for a jury.

You have also the right of appeal of any judgment to the Court of Appeals, and this would apply regardless of the three Judge finding or the jury finding, do you understand? It compares.

The Defendant: Yes, Your Honor, I do.

Judge Betleski: You have the right to appeal without cost, if you're unable to pay the cost of an appeal, you understand?

The Defendant: Yes, I do.

Judge Betleski: That's where the person is impoverished or indigent.

[28] You have a right to appointed counsel on an appeal if you're unable to hire counsel, you understand?

The Defendant: I understand.

Judge Betleski: And you have the right to have the necessary documents prepared for an appeal without cost if you can't afford them, you understand?

The Defendant: I understand.

Judge Betleski: There's one other item here that's listed. You have the right to assistance of attorneys at all stages of the proceedings, which is true, do you understand that?

The Defendant: Yes, sir, I do.

Judge Betleski: You've already had that up to this time and it's not going to terminate, you understand?

The Defendant: Yes, sir, I do.

Judge Betleski: Do you know that if you plead no contest, there will be no trial either to a jury or to the Court on any of the charges that you plead no contest to, and that you will be giving up your constitutional rights set out above, except certain rights of appeal which your [29] lawyers have explained to you?

The Defendant: I understand.

Judge Betleski: Yes, okay.

Your lawyers have informed you that the penalties for aggravated murder, should you be convicted under counts two or three of Case Number 29194, and if you're also convicted of the first specification under either of those counts, can be death, life imprisonment without possibility of parole for thirty years, or life imprisonment without possibility of parole for twenty years.

The penalties may also include a fine of up to $25,000, and there is no possibility of probation.

Do you understand that?

The Defendant: Yes, sir, I do.

Judge Betleski: So that, on counts two and three, with the specs, it can be death, life imprisonment without possibility of parole for thirty years, or life imprisonment without possibility of parole for twenty years, you understand?

The Defendant: Yes, sir, I do.

Judge Betleski: They are serious.

[30] The mandatory penalty for aggravated murder as contained within count two or count three of the indictment to which you would be subjected if found guilty of those aggravated murder offenses but not guilty of any specifications under Ohio Revised Code 2929.04 is life imprisonment without possibility of parole for twenty years.

This penalty may also include a fine of up to $25,000.

I understand that there would be no possibility of probation.

This touches on the offenses without the specs, correct, Counsel?

Ms. McGough: That's correct, Your Honor.

Judge Betleski: So that, it would be life imprisonment without possibility of parole for twenty years.

Now, the possible penalty on count one, which is an aggravated felony of the first degree, is a minimum term of confinement of five, six, seven, eight, nine or ten years, and a maximum term of confinement of twenty-five years.

These terms of confinement may be imposed as actual incarceration.

[31] In addition, the possible fine for an aggravated felony of the first degree is not more than $10,000.

Touching on count number one again, you notice there's a spread of time that can be imposed as a part of the sentence. It can be five, six, seven, eight, nine or ten, to twenty-five.

Of the lower years that are listed there, that can be actual incarceration. Actual incarceration means that there can be no probation, no parole. The only thing you can get is good time servitude, and conceivably a governor's pardon. That's about the only extent.

Otherwise than that, actual incarceration means that you serve the time without hope of parole or probation, or without any work release or something of that nature, you understand?

The Defendant: Yes, Your Honor, I understand.

Judge Betleski: Do you understand that if you're found guilty of a specification involving your having a firearm on or about your person or under your control during the commission of any of the offenses of which you're charged, the punishment for each shall include an [32] additional term of incarceration of three years, which term or terms shall be served consecutively with and prior to any other sentence which may be imposed for the offenses?

In addition, do you understand if you're found guilty of count one and also found guilty of having a firearm on or about your person or under your control during the commission of the aggravated robbery offense set forth in count one, the Court shall impose a term of actual incarceration of three years in addition to any other sentence imposed, which term shall be served consecutively with and prior to any other sentence imposed; do you understand that?

The Defendant: Yes, Your Honor, I do.

Judge Betleski: With a firearm it's three additional years of actual incarceration, and that has to be served prior to any other servitude. It only applies to count number one, you understand?

The Defendant: Yes, I understand.

Judge Betleski: It says here in the next paragraph you understand that the Trial Judge must orally inform you of your rights and the law [33] and the possible punishments to which you are subject by a plea of no contest, if accepted; and if applicable, that you're not eligible for probation consideration pursuant to Ohio Criminal Rule 11 or any other provision of the law of this State, you understand that?

The Defendant: Yes, Your Honor, I do.

Judge Betleski: Sometimes people tender a plea with the concept in mind that they could be considered for probation, but these offenses are such that the law precludes any Judge to consider any probation for an offender, do you understand?

The Defendant: Yes, I do.

Judge Betleski: The next sentence indicates—and I don't know what your history or background is—it says if you are presently on probation or parole in this or any other Court, you know that by pleading no contest in this matter your probation or parole may be revoked and

you would thereafter be required to serve imprisonment in the case for which you are on probation or parole in addition to any sentence imposed on you in this case or these cases, you [34] understand?

The Defendant: Yes, Your Honor.

Judge Betleski: If you are presently on probation or parole, then your plea here acts as a revocation and that would have to be re-served, so to speak; the unserved balance of that punishment would have to be served before this sentence could be served.

You understand that by law the sentence in these cases will be served consecutively to the sentence in any case for which you're on probation or parole.

That's another way of saying the same thing. Consecutive means one after the other; concurrent means together.

Now, you're declaring that no officer of this Court, any counsel or any Court, has promised or suggested that you will receive a lighter sentence, probation, or any other form of leniency in exchange for your no contest plea.

If anyone did make such a promise, I know that he or she had no authority to do that.

Now, that's important. I don't know of anybody that's offered you either a lighter sentence or probation or any other forms of leniency.

[35] So that, that would be considered as an inducement to you to plead, you follow?

The Defendant: I think so, Your Honor.

Judge Betleski: In other words, if someone promised you something less or some advantage. Usually I ask that question. Did anyone offer you any kind of a reward or benefit for this plea?

The Defendant: No, they didn't, Your Honor.

Judge Betleski: You see, that means it's got to be voluntary, it's got to be from you standing there and saying, "I plead."

Because if it was an inducement for a reward—and leniency would be a reward or probation would be a reward if potential in the future—but nevertheless, it would be a reward. So that, we're clear that no one offered you that sort of a benefit.

Now, how about force or threat or fear of some avenue, some area?

The Defendant: No, Your Honor.

Judge Betleski: That goes to the voluntariness of the plea, too. Because if there is some threat or pressure and you're pleading to [36] get rid of that threat or pressure, then that isn't voluntary, you understand?

The Defendant: I understand.

Judge Betleski: You've authorized your attorneys to enter into negotiations with the State of Ohio, represented by the Lorain County Prosecutor's Office, and you understand that as a result of those negotiations the State of Ohio had indicated its willingness to accept the following plea.

Now I'll read it, and I'll read it as though you're reading it, okay?

I will plead no contest to the following offenses and specifications: One, the aggravated robbery of the Slumber Inn Motel and/or the desk clerk, Helen G. Vantz, as set out in count one in Case Number 29194, a violation of Section 2913.01 of the Ohio Revised Code; specification one to count one under the same indictment; the aggravated murder of Helen G. Vantz with prior calculation and design as set out in count two in Case Number 29194, a violation of Section 2903.01(A) of the Ohio Revised Code; number four, specification one to count two under this indictment; number five,

specification two to count two under this indictment; number six, the aggravated murder of Helen G. Vantz [37] while committing the crime of aggravated robbery as set out in count three of Case Number 29194, in violation of Section 2903.01(B) of the Ohio Revised Code; seven, specification one to count three under this indictment; eight, specification two to count three under this indictment.

That's pretty technical but it really says all of the things I've said previously, the nature of the offense, what the potential punishment is, and what you're pleading no contest to.

You're really pleading no contest to all of the counts and specs in the indictment, you understand?

The Defendant: Yes, Your Honor, I do.

Judge Betleski: You counsel have been overzealous, because here he says again he affirmatively states that no one has used any force, threats or coercion, or made any representations or promises to me in order to get me to plead no contest to the charges in the indictment against me in Case Number 29194. That repeats the same thing.

Is the plea voluntary? If it is, then it can't be based on any representations or promises, [38] you understand?

The Defendant: Yes, I do.

Judge Betleski: You further understand that when you plead no contest to all of the charges and specs in the indictment against you in this case, you will be subjected to mandatory incarceration.

And I understand fully the penalty for each of my eight separate pleas of no contest as set forth herein generally above but as specifically set forth as follows to each count and specification of the indictment to which I am pleading no contest.

Sub-paragraph A, aggravated robbery, count one of Case Number 29194 and specification one of count one carries the following possible penalties.

We're repeating ourselves, but I guess for the record it's better that it be clear.

A minimum term of confinement of five, six, seven, eight, nine or ten years; a maximum term of confinement of twenty-five years. The term may be imposed as actual incarceration.

The count also carries a mandatory term of imprisonment of three years, which must be served consecutively with and prior to any other sentence [39] imposed upon me.

Futher, you can be fined up to $10,000 on this count.

The nature of the offense, the degree of punishment, do you understand?

The Defendant: Yes, Your Honor, I do.

Judge Betleski: B, aggravated murder under count two and the first spec there, specification thereto, carries the following possible penalties: Death, life imprisonment with parole eligibility after thirty years, or life imprisonment with parole eligibility after twenty years.

Should the death penalty not be selected as the punishment, any sentence of imprisonment would be mandatory. A fine up to $25,000 may also be imposed.

Specification two, which involves possession of a firearm while committing the offense set out in count two, requires a mandatory term of imprisonment of three years, which must be served consecutively with and prior to any other sentence imposed upon you.

That is a serious one. Death, life [40] imprisonment with parole eligibility after thirty years, or life imprisonment with parole eligibility after twenty years, or a $25,000 fine, plus the three years for the firearm, you understand?

The Defendant: Yes, Your Honor, I do.

Judge Betleski: The next paragraph. Aggravated murder, count three, and the first specification thereto carries the following possible penalties: Death, life imprisonment with parole eligibility after thirty years, or life imprisonment with parole eligibility after twenty years. So that, it's the same thing.

And should the death penalty not be selected as the punishment, any sentence of imprisonment would be mandatory. A fine up to $25,000 may also be imposed.

The specification two involves possession of a firearm while committing the offense set out in count three, which requires a mandatory term of three years, which must be served consecutively with and prior to any sentence imposed.

Two and three are identical, they are the same, they are serious penalties, you understand?

The Defendant: Yes, Your Honor.

[41] Judge Betleski: You further understand that all of the above sentences may be imposed consecutively, one after the other, to be served one after the other; or concurrently, to be served at the same time, at the discretion of the Court—that's the three of us—except that all offenses involving three year mandatory sentences for possession or use of a firearm as set out above must be served consecutively with and in addition to each other and to any other sentences.

You understand?

The Defendant: Yes, I do.

Judge Betleski: Firearms are separate, they are consecutive; the other three can be concurrent.

The Defendant: I understand.

Judge Betleski: They can be consecutive or concurrent.

Do you understand that the sentence you receive will be a matter within the control of the—it says Trial

Judge; it means the three Judges; we have to be unanimous on this—and the penalties established by law for the offenses to which you're pleading no contest?

Do you understand that?

[42] The Defendant: Yes, Your Honor, I do.

Judge Betleski: Are you prepared to accept any punishment permitted by law which this Court sees fit to impose?

The Defendant: Yes, Your Honor.

Judge Betleski: Paragraph nineteen is the one where there's some eradication, and I don't know what it did contain but I'll read nineteen as I see it.

Because I admit the truth of all of the facts alleged in the indictment against me in Case 29194 as stated herein, I respectfully request the Court to accept my plea of no contest in accordance with the terms of this document and the negotiations set forth herein between my lawyers and the prosecuting attorney, which plea I am now tendering to the Court.

That repeats what I said. It's suspended all the while I've been reading. That plea of no contest has been tendered, has been proffered, and it's still in suspension. It hasn't been accepted yet, you understand?

The Defendant: I understand.

Judge Betleski: Now, are you under [43] the influence of any alcohol or drug at this time?

The Defendant: No, Your Honor.

Judge Betleski: So that, you have all of your faculties?

The Defendant: Yes, Your Honor.

Judge Betleski: Are you offering this plea to the offenses and the specs voluntarily and of your own accord, with full understanding of all matters set forth in this?

The Defendant: Yes, Your Honor, I am.

Judge Betleski: It says here you acknowledge all of the above documents containing twenty-one paragraphs and consisting of nine pages by signing it this 30th day of November, 1984.

Is that your signature there, Mr. Post?

The Defendant: Yes, Your Honor, it is.

Judge Betleski: Ronald Post.

The record is clear. I have gone over it as minutely and as clearly as I could. Is there anything about that that I inquired that you need further inquiry about?

The Defendant: No, Your Honor.

Judge Betleski: Bear with us.

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[44] Thereupon, a discussion was had off the record.

Judge Betleski: Now, I am satisfied, and I've discussed it with the other Judges. We're satisfied that the Defendant is aware of his rights, the right to a jury trial. He's had benefit of counsel; he knows the privileges against self-incrimination, the right to get witnesses; recognizes the nature of the charges against him, the potential penalties and punishments; recognizes he's not eligible for probation; recognizes the actual incarceration and the mandatory punishments that could be presented here, his entitlement to what, witnesses, compulsory service of process.

I need not go on further. The Court is satisfied that this gentleman is aware of his rights and the nature of the charges against him.

We're now ready to hear narration of the facts in substantiation, unless you have something further.

Mr. Duff: Nothing.

Mr. McGough: There's one other thing that I would like to put on the record in addition to the plea sheet.

Pages 88 through 91 of the Transcript of Proceedings on March 12, 1985

[88] Mr. Nagy: For the record, I would proffer the tape into the record of this particular hearing, and we have no further rebuttal to present. The State would rest.

Judge Betleski: Is it your wish now on summation then?

Mr. Duff: May we approach the bench?

Judge Betleski: Yes. Well, you have the burden. You can lead.

Mr. Duff: Can we approach the bench, Your Honor?

Judge Betleski: Sure.

Thereupon, a discussion was had off the record.

Ms. McGough: Your Honor, if it please the Court, the Defense has rested its case and the rebuttal is closed at this point.

We would now request that the victim's family be permitted to speak.

Judge Betleski: All right. Is there any member of the Vantz family that would wish to bring to the Court's attention matters that might be pertinent on aggravation or mitigation?

[89] Mr. Vantz: Yes, Your Honor.

Judge Betleski: It's William, is it?

Mr. Vantz: Yes, sir.

Judge Betleski: Why don't you come into the litigation area; and if you would please, stand near Mr. Duff and you can address us then. We'd be happy to hear what you have.

Mr. Vantz: I don't know how to begin.

Judge Cirigliano: Just start with your name and address.

Mr. Vantz: Okay. My name is William H. Vantz. My address is 2496 Homewood Drive, Lorain, Ohio.

This has been quite a burden on our family, not financially to say, but more in the sense that there are people out there who can take your life for no reason whatsoever at any time of the day or night, and that scares me to death. It scares my wife, it scares all my relatives.

You can pick up a newspaper and read about somebody else being killed but it never strikes until it strikes your home.

My mother was a caring, loving woman who would do anything for anyone. She never hurt [90] anyone; she would never, ever hurt anyone. She wouldn't have put up a fight. There was—she had no defense.

In the twelve years that she worked at Slumber Inn she had never had a Christmas off, and this Christmas—well, the Christmas of 1983, she was supposed to have gone to Mentor and stayed with my brother, his wife, and her only grandson.

That would have been the first Christmas in thirteen years; twelve, thirteen years. She never got that chance, she never got the opportunity.

She was supposed to go see her day's old cousin, her mother's—her niece's daughter that morning, and she never got the chance.

Just she was full of life. She loved to go places and do things. She went to Austria, she went to the Bahamas. She enjoyed her life to the fullest, and for it to be taken in such a way is just inexcusable.

I cannot in my heart forgive Mr. Post; I never will. There is no way I could do that. He took from me my mother, and my mother was—Mr. Post has had a chance to defend himself; she never got that chance.

She was executed; and I feel the only just [91] punishment for execution is execution. My family feels that way, my cousins, my brothers, our wives, friends of the family.

We loved that woman, as did everyone that came in touch with her. A part of my life left when she left, and that will never come back.

There are things that she'll never see that she wanted to see, like my child, if I have one.

This is hard for me because I'm not—I don't like to publicly speak, but somebody had to tell our side of the story.

I'm going to leave it in your hands to do what's right, what's just. I'm not versed in the law, but yet in my heart I feel the only thing to do is to give Mr. Post what he deserves.

Thank you.

Judge Betleski: Thank you, Mr. Vantz. We appreciate your presentation.

The Court has discussed with counsel, and each side is going to get twenty minutes for summation and argument, with the State presenting in the first instance.

I'll keep track of the time, and we're happy to hear your arguments.

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SUPREME COURT OF THE UNITED STATES

RONALD RAY POST *v.* OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 87-6127. Decided February 22, 1988

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), I would vacate the judgment of the Ohio Supreme Court insofar as it left undisturbed the sentence of death imposed in this case.

II

Even if I did not hold this view, I would vacate petitioner's sentence because it was imposed under the same circumstances this Court recently condemned in *Booth* v. *Maryland*, 482 U. S. —— (1987). In *Booth*, the Court invalidated a Maryland statute that required the sentencer in a capital case to consider information contained in a "victim impact statement." The statement was prepared by the Maryland State Division of Parole and Probation, and it described the emotional impact of the crime on the victim's family members as well as their opinions of the offense, the offender, and the appropriate punishment. This Court held that such information is irrelevant to a capital sentencing decision and that its admission creates a constitutionally impermissible risk that the jury will impose the death penalty in an arbitrary manner. We concluded that the introduction of such evidence is inconsistent with the reasoned decisionmaking required in capital cases.

In the instant case, petitioner Ronald Ray Post entered a plea of no contest to charges of aggravated murder and aggravated robbery arising out of the killing of a motel desk clerk during an armed robbery of the motel. A three-judge panel convicted petitioner on all counts and convened a sentencing hearing. At the sentencing hearing, the panel received a presentence report prepared by the county department of probation that contained a victim impact statement. In addition, the victim's son testified orally to the panel regarding the effect of the murder on the victim's family and urged the panel to return a sentence of death. The panel found one aggravating circumstance—that the murder was committed during the course of an armed robbery—and no mitigating circumstances; it therefore sentenced petitioner to death.

The Ohio Supreme Court affirmed petitioner's sentence on appeal, rejecting petitioner's argument that his sentence must be vacated because it was imposed in violation of *Booth* v. *Maryland*, *supra*. See 32 Ohio St. 3d 380, 513 N. E. 2d 754 (1987). The court recognized that the admission of the written victim impact statement and the oral testimony of the victim's son was error under both Ohio law and the federal constitutional analysis of *Booth*. But the court concluded that the error was not prejudicial because the sentencer was a three-judge panel rather than a jury. Citing a pre-*Booth* Ohio case, the court invoked the presumption that judges consider only relevant evidence and found that a court's capital sentencing decision must stand absent an indication that the court "was influenced by or considered" victim impact evidence in arriving at its decision. 32 Ohio St. 3d, at 384, 513 N. E. 2d, at 759. Observing that the panel's written opinion mentioned the victim impact evidence but did not cite it as a basis for its decision, the court concluded that petitioner's sentence could stand. *Ibid.*

The reasoning of the Ohio Supreme Court is flatly inconsistent with both the holding and the reasoning of this Court's decision in *Booth*. The Maryland statute considered in *Booth* required that victim impact evidence be considered by *both* courts and juries.* This Court's complete invalidation of that statute in no way distinguished or preserved a question as to nonjury sentencings. Moreover, in *Booth*, both the Maryland Court of Appeals and the State in its argument to this Court relied primarily on a prior Maryland case in which the capital sentencer was a judge. See *Lodowski* v. *State*, 302 Md. 691, 490 A. 2d 1228 (1985). This Court noted that argument and cited *Lodowski* in *Booth* without according any relevance to the identity of sentencer. See *Booth* v. *Maryland*, *supra*, at ——, ——. Furthermore, the reasoning of the *Booth* opinion made clear that the result in that case did not require a showing that the victim impact evidence actually "influenced" the sentencer. Rather, the Court expressly stated that the victim impact evidence was inadmissible because it created "a constitutionally unacceptable *risk*" that the sentencer would impose the death penalty in an arbitrary manner. *Id.*, at —— (emphasis added). Indeed, the Court summarized its holding by stating: "We conclude that *the introduction* of a [victim impact statement] at the sentencing phase of a capital murder trial violates the Eighth Amendment . . . ." *Id.*, at —— (emphasis added). The Ohio Supreme Court could have reached its conclusion only be ignoring these significant aspects of this Court's decision in *Booth*.

I am mindful of the established presumption that judges are able to distinguish between relevant and irrelevant evi-

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*The Maryland statute reads in relevant part:

"In any case in which the death penalty is requested . . . a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and Probation, and shall be considered by *the court or jury* before whom the separate sentencing proceeding is conducted . . . ." Md. Ann. Code, Art. 41, § 4–609(d) (1957) (emphasis added).

dence. There is every indication in this case, however, that the three-judge panel failed to make any such distinction. The panel's written opinion explictly notes that it "considered" the presentence report submitted to it, which contained the victim impact statement, and that it "heard" the statement of the victim's son. App. to Pet. for Cert 39, 40. At no point either at the hearing or in its opinion did the panel demonstrate any awareness that such evidence was inadmissible under state law or prohibited by the Federal Constitution. More important, the presumption that judges know and apply the rules of evidence should not be converted into license to conclude that judges are inhuman, incapable of being moved by passion as well as by reason. It would be unrealistic and unwise to presume that no judge could be moved, in both heart and deed, by the anguish and rage expressed by a murder victim's family. The potentially inflammatory effect of such evidence convinced this Court in *Booth* that its admission endangered the reasoned decisionmaking required in capital cases. In the instant case, in which the evidence took the form of personal testimony as well as third-person, written description, there is no reason to denigrate that danger simply because the recipients of the evidence wore judicial robes.

The Ohio Supreme Court's decision in this case threatens to undermine both the holding and the reasoning of this Court's decision in *Booth*. The Court should grant certiorari in order to preserve the integrity of its recent pronouncement. I dissent.